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v.
Alafabco, Inc., et al.
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IN THE
Supreme Court of the United States

THE CITIZENS BANK
Petitioner,

v.

ALAFABCO, INC., DONNIE COTTINGHAM, JOANN BECK, AND WESTON BECK,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Has the Alabama Supreme Court departed from *Allied-Bruce* and its progeny, as well as from other state and federal courts, in holding that an individual transaction, standing alone, must not only "involve" commerce but must also "substantially affect" interstate commerce to come within the purview of the Federal Arbitration Act?

CORPORATE DISCLOSURE STATEMENT

The Citizens Bank has no parent company. There are no publicly held companies owning at least ten percent of the stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
CORPORATE DISCLOSURE STATEMENT ii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 2
STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 10
I. THE DECISION BELOW APPLIES A TEST THAT IS CONTRARY TO THIS COURT'S PRECEDENTS AND THAT CONTRAVENES THE LANGUAGE AND PURPOSE OF SECTION 2. 11
A. The Alabama Supreme Court improperly reads dictum from *Lopez* as requiring that a commercial transaction must not only "involve" or "affect" interstate commerce under Section 2 of the FAA (as set forth in *Allied Bruce*), but must "substantially affect" interstate commerce 13
B. The decision below improperly focuses upon individual commercial transactions, rather than their effects in the aggregate. 15
II. THE DECISION BELOW CONFLICTS WITH THE VIEW OF OTHER STATE AND FEDERAL COURTS ON THE SCOPE OF "INVOLVING COMMERCE" UNDER SECTION 2. 19
CONCLUSION 22

TABLE OF AUTHORITIES

Cases

A.L.A. Schechter Poultry Corp. v. United States,
295 U.S. 495 (1935).....16

Allied-Bruce Terminix Companies, Inc. v. Dobson,
628 So.2d 354 (Ala. 1993).....11

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995).....8, 10, 11, 12, 14, 15, 17

Alternative Fin. Solutions, LLC v. Colburn,
821 So.2d 981 (Ala.2001).....9

Aronov Realty Brokerage, Inc. v. Morris,
2002 WL 734345 8

Chesser v. AmSouth Bank, N.A.,
2002 WL 31151340 *3 (Ala.).....14

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001).....15

Episcopal Hous. Corp. v. Fed. Ins. Co.,
239 S.E.2d 647 (S.C. 1977) 21

Ex parte Costa & Head,
486 So.2d 1272 (Ala. 1986).....11

Ex parte Kampis,
826 So.2d 819 (Ala. 2002).....9

Ex parte Learakos,
826 So.2d 782 (Ala. 2001).....9

Fry v. United States,
421 U.S. 542 (1975).....15

Government of Virgin Islands v. United Indus. Workers, N.A.,
169 F.3d 172 (3rd Cir. 1999) 20

Haeberlin Farms, Inc. v. IGF Insurance Company,
641 N.W.2d 816 (Iowa 2002) 20

Hodel v. Virginia Surface Mining & Reclamation Ass'n,
452 U.S. 264 (1981).....15

Hurst v. Tony Moore Imports,
699 So.2d 1249 (Ala. 1997) 13

In re Education Management Corp., Inc.,
14 S.W. 3d 418 (Tex.App.-Houston 2000).....19

In re L&L Kempwood Associates, LP,
9 S.W.3d 125 (Tex. 1999).....19

In re Turner Bros. Trucking Co., Inc.,
8 S.W.3d 370 (Tex.App.-Texarkana 1999).....19

Liberty Nat'l Life Ins. Co. v. Douglas,
826 So.2d 806 (Ala. 2002).....8

Lopez v. Home Buyers Warranty Corp.,
628 So.2d 361(Ala. 1993).....11

Maryland v. Wirtz,
392 U.S. 183 (1968).....17

McConnell Auto Corp. v. Jackson,
2002 WL 31439766 (Ala.).....16, 18

McIntosh v. Tenet Health Systems Hospitals, Inc.,
48 S.W. 3d 85 (Mo.App. 2001) 21

Parkway Dodge, Inc. v. Hawkins,
2003 WL 257409 (Ala.).....14

Perry v. Thomas,
482 U.S. 483 (1987).....10

Rogers Found. Repair, Inc. v. Powell,
748 So.2d 869 (Ala.1999).....14

Sisters of the Visitation v. Cochran Plastering Co.,
775 So.2d 759 (Ala. 2000).....7, 8, 9, 11, 12, 13, 14
Southland Corp. v. Keating,
465 U.S. 1 (1984).....10, 11
U.S. v. Nachef,
1998 WL 151270 (D.Mass.) 19
United States v. Harrington,
108 F.3d 1460 (D.C. Cir. 1997).....19
United States v. Lopez,
514 U.S. 549 (1995).....12, 14, 17
United States v. Woodruff,
122 F.3d 1185 (9th Cir. 1997) 19
United States v. Woodruff,
941 F.Supp. 910 (N.D.Cal. 1996) 19
Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.,
489 U.S. 468 (1989).....10
Wickard v. Filburn,
317 U.S. 111 (1942).....15, 16
Zabinski v. Bright Acres Associates,
553 S.E.2d 110 (S.C. 2001) 20

Statutes
29 U.S.C. § 1257.....2
Federal Arbitration Act
9 U.S.C. § 1.....2
9 U.S.C. § 2.....2

IN THE
Supreme Court of the United States

THE CITIZENS BANK
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v.
ALAFABCO, INC., DONNIE COTTINGHAM, JOANN BECK, and WESTON BECK,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Alabama

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COMES NOW the Petitioner, and requests that this Court issue a writ of certiorari to the Supreme Court of Alabama in the above-referenced matter.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama has not been released for publication in a reporter. The text of the opinion is reprinted and attached to this petition as Petitioner's Appendix (Pet. App.) at pp. A1-A25. It is also available through Westlaw at 2002 WL 1998268. The denial of an application for rehearing in that court is also attached. (Pet. App. A26). The order of the trial court compelling

arbitration in the case is not a reported decision, and is also reprinted and attached to this petition. (Pet. App. A27).

JURISDICTION

The Alabama Supreme Court entered a judgment denying the petitioner's right to arbitration on August 30, 2002, and overruled a timely application for rehearing on November 27, 2002. The jurisdiction of this court is invoked pursuant to 29 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

This case involves construction of the Federal Arbitration Act. Section 2 of the Act (9 U.S.C. § 2) provides:

> **Validity, irrevocability, and enforcement of agreements to arbitrate**
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section one of the Act (9 U.S.C. § 1) provides in pertinent part:

> **"Maritime transactions" and "commerce" defined; exceptions to operation of title**
>
> . . . "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

STATEMENT OF THE CASE

This case involves the Alabama Supreme Court's construction of Section 2 of the Federal Arbitration Act (FAA) and its test for "interstate commerce." Once again, the Alabama Supreme Court has embraced a reading of the FAA that is in direct opposition to its purpose, and that instead furthers Alabama's hostility toward arbitration.[1] Contrary to this Court's instruction that the "involving commerce" prerequisite of Section 2 means "affecting commerce," the Alabama Supreme Court has stated its rule in numerous cases that a transaction must "substantially affect" interstate commerce to come under the FAA. In the case below, the court reversed a trial court order compelling arbitration, reasoning that the commercial loan contract at issue did not

[1] Pursuant to Alabama Code Section 8-1-41(3), the state has banned pre-dispute arbitration agreements in their entirety.

evidence a transaction that "substantially affects" interstate commerce.

The arbitration agreements at issue arose out of a series of commercial loan transactions between the lender, The Citizens Bank, ("Citizens Bank") and debtors Alafabco, Inc., and Donnie Cottingham, Joann Beck, and Weston Beck (officers and employees of Alafabco who executed personal notes) (hereinafter collectively "Alafabco"). Alafabco is an Alabama fabrication company. Alafabco borrowed large sums of money on numerous occasions from Citizens Bank for the purpose of covering business operating expenses on construction contracts. Alafabco used these funds to finance labor and material costs for work performed on its contracts, including work in Alabama, North Carolina and Tennessee. (Vol. I, CR. 117).[2]

Alafabco defaulted on its various loan obligations to Citizens Bank and the bank began collection efforts. Attorneys for the parties negotiated an agreement under which *all* of Alafabco's debts to the bank were restructured and redocumented in several notes dated May 3, 1999. In this restructuring, Alafabco provided a security interest in all of its business assets, including accounts receivable, inventory, equipment and motor vehicles. Three of Alafabco's officers provided personal notes secured by mortgages. (Vol. Ex., G, H). Each debtor also executed an arbitration agreement:

> AGREEMENT TO ARBITRATE. The Citizens Bank ("Lender") and the undersigned agree that all disputes, claims, or controversies

[2] References to the appellate record are by the volume, followed by the designated page of the clerk's record ("CR") or transcript ("TR"). The clerk assembled one volume of exhibits, referenced herein as "Vol. Ex."

> ("Disputes") between them, whether individual, joint, or class in nature, including contract and tort disputes and any other matter at law or equity, shall be resolved by arbitration upon request of either party at any time, notwithstanding the prior filing by either party of any legal action, except as otherwise indicated in this Agreement or agreed to in writing by the parties. In an arbitration, an arbitrator, who is an independent, neutral party, gives a decision after hearing the positions of the parties. It is understood and agreed that arbitration pursuant to this agreement shall be binding upon both parties and that both parties are waiving their respective rights to a jury trial. However, nothing in the loan documents or this agreement shall preclude any party from seeking equitable relief from a court of competent jurisdiction.
>
> . . .
>
> GOVERNING LAW. The Federal Arbitration Act shall apply to the construction, interpretation, and enforcement of this arbitration agreement. The arbitration of any dispute shall be governed by the Rules of the American Arbitration Association. If there is an inconsistency between these rules and this Agreement, this Agreement shall govern.

(Vol. Ex. I, P).

After this restructuring of the debt, Alafabco again defaulted on the notes. In response to collection efforts, Alafabco filed a Chapter 11 petition in the United States Bankruptcy Court for the Northern District of Alabama.

Citizens Bank filed a motion in the Bankruptcy Court for adequate protection regarding Alafabco's continued use of the loan collateral. The Bankruptcy Court entered an Order under which Alafabco stipulated to a perfected security interest and lien upon its assets. (Vol. Ex., A). The parties once again restructured the loan obligations, executed new loan documents dated December 10, 1999, and the bankruptcy proceedings were dismissed. (Vol. Ex., B, C, D). This second debt restructuring involved a total amount of approximately $430,000 secured by commercial real estate owned by the individual officers, as well as the business assets of Alafabco. All debtors again signed arbitration agreements virtually identical to the ones excerpted above. (Vol. Ex., E, F).

Approximately one year after execution of the last renewal notes, Alafabco sued Citizens Bank and three of its officers under various theories including breach of fiduciary duty, breach of implied contract, misrepresentation, negligence, and intentional infliction of emotional distress. (Vol. I, CR. 7). Citizens Bank moved the trial court to compel arbitration pursuant to the arbitration agreements executed by each debtor. (Vol. I, CR.68). In support of this motion Citizens Bank submitted affidavits from bank officers Roger Campbell and Doug Alexander establishing that a substantial portion of the money loaned to Alafabco by Citizens Bank was used by Alafabco to finance labor and materials on contracts for work in North Carolina, Tennessee, and Alabama. (Vol. I, CR. 76, 117). The use of these funds both in state and out of state is documented by invoices contained in the record.[3] (Vol. I, CR. 86, 92 (North Carolina), 84 (Tennessee), 87 (Alabama)).

[3] Citizens Bank made loans to Alafabco, taking a security interest in outstanding invoices to Alafabco customers. For example, one bank loan of $31,659.49 references as security "Champion Int. Inv. No. 676; Job 1430," indicating that the funds were loaned for and used for work on a

As reflected in the renewal notes executed in May and December of 1999, Citizens Bank held a security interest in the inventory of Alafabco, including inventory manufactured and created using sub-products obtained outside the state of Alabama, utilizing raw materials manufactured outside the state of Alabama and sold through utilization of the United States mails and telephones in interstate commerce. (Vol. I, CR. 78). Citizens Bank held a security interest in all of Alafabco's tools, machines and equipment, manufactured throughout the United States. (Vol. II., Tr. 14-15). Citizens Bank also held a security interest in the intangible business property of Alafabco, including accounts receivable and unpaid invoices from out-of-state companies. (Vol. II., Tr. 14). The security interest held by Citizens Bank in accounts receivable of Alafabco includes receivables distributed through the mail and deposited in bank accounts subject to Federal Regulations. (Vol. I, CR. 78).

Further, the December debt restructuring was accomplished in the course of United States Bankruptcy proceedings, applying federal law and procedures. Payments by and between the parties in connection with the transactions underlying the agreements were accomplished by checks which were cleared by the Federal Reserve, using the United States mails and interstate financial settlement procedures and institutions. Policies and procedures governing Citizens Bank and its transacting of business with Alafabco are subject to regulation by federal agencies and federal laws.

North Carolina project. (Vol. I, CR. 90, 92). See also Vol. I, CR. 86, 88 reflecting $21, 130.01 loaned and security listed as Champion Int. Inv. No. 681, Job 1436 (North Carolina job).

The evidence submitted by Citizens Bank also established that the bank's commercial loan business in the aggregate is quite substantial, including large commercial loans in the millions of dollars. (Vol. II, Tr. 8). Citizens Bank issues loans in other states including Florida and Colorado, and has deposit customers located throughout the southeastern United States, and other customers throughout the country as a whole. (Vol. II, Tr. 13).

The trial court found that the loan transactions at issue involved interstate commerce, and entered an order staying the proceedings and compelling arbitration of Alafabco's claims against Citizens Bank.[4] (Vol. I, CR. 194-95). Alafabco appealed this ruling to the Alabama Supreme Court. That court reversed, holding that Citizens Bank failed to prove a sufficient nexus with interstate commerce to invoke the FAA. The court stated that the proponent of arbitration "bears the burden of proving a sufficient connection with interstate commerce . . .applying the five-part test set forth in [*Sisters of the Visitation v. Cochran Plastering Co.*, 775 So.2d 759 (Ala. 2000)]." (Pet. App. A7). In *Sisters of the Visitation*, the Alabama Supreme Court instructed that one seeking to compel arbitration must prove a "substantial" affect on interstate commerce under a test examining the following: (1) the citizenship of the parties, (2) the origin of tools and equipment actually used in the transaction, (3) the allocation of cost of services and materials, (4) the subsequent movement across state lines of the object of the services, and (5) the degree of separability from other contracts. *Sisters of the Visitation*, 775 So.2d at 765-57. The Alabama court applies this test to the particular transaction at issue to see if *that transaction* substantially affects interstate commerce; the court does not consider the aggregate effect of

[4] Arbitration as to defendant Charles Coffey was denied, as he was not a signatory to any of the arbitration agreements. (Vol. I, CR. 193).

similar activity upon interstate commerce. Applying this analysis, the Alabama court has denied arbitration in numerous contexts.[5]

Applying the principles of *Sisters of the Visitation* to the instant case, the Alabama Supreme Court determined that Citizens Bank failed to prove that the 1999 loan restructurings, standing alone, substantially affected interstate commerce. The court rejected arguments relating to the interstate use by Alafabco of the loan proceeds, determining that Citizens Bank was required to prove which portions of which loan proceeds were actually used in other states, and what portion of those proceeds were still unpaid and thus included in the loan restructurings of May and December of

[5] In the opinion below, Alabama Supreme Court Justice See noted:

> Since our decision in *Sisters of the Visitation* in March 2000, this Court has routinely denied a party the right to arbitration where that party has failed to prove that the individual transaction substantially affected interstate commerce. *See Aronov Realty Brokerage, Inc. v. Morris*, [2002 WL 734345] (denying arbitration in an action brought by the purchaser of a condominium unit against a real estate brokerage, a real estate agent, and the condominium association); *Liberty Nat'l Life Ins. Co. v. Douglas*, [826 So.2d 806 (Ala. 2002)] (refusing to compel arbitration where an employee of an insurance company sued her employer); *Ex parte Kampis*, [826 So.2d 819 (Ala. 2002)] (denying arbitration in an action brought by the purchaser of a house against a contractor); *Alternative Fin. Solutions, LLC v. Colburn*, 821 So.2d 981 (Ala.2001) (denying arbitration where borrowers brought an action against lenders challenging the legality of certain loans); and *Ex parte Learakos*, [826 So.2d 782 (Ala. 2001)(denying arbitration in an action brought by the purchaser of a house against a real estate company and its agents). (Pet. App. 22-23).

1999.[6] (Pet. App. 13-15). The court likewise refused to consider the aggregate effect of similar transactions upon interstate commerce.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Alabama has decided an important issue concerning the phrase "involving commerce" in Section 2 of the FAA in a manner that runs contrary to language of Section 2 and the established purpose of the Act. Consistent with the purpose of the Act, [7] the phrase "involving commerce" is construed broadly. Section 2 by its terms applies to any contract evidencing a transaction "involving" commerce. This Court has stated that the phrase "involving" commerce is the functional equivalent of "affecting" commerce. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74 (1995) (the reach of the Act coincides with that of the Commerce Clause itself), citing *Perry v. Thomas*, 482 U.S. 483, 490 (1987) (noting Congressional intent to enforce arbitration agreements "within the full reach of the Commerce Clause") and *Southland Corp. v. Keating*, 465 U.S. 1, 14-15 (1984) ("involving commerce" marks the outer reach of the Act).

The Alabama Supreme Court, (although previously reversed by this Court in *Allied-Bruce* for implementing a too narrow construction of the "commerce" requirement), again

[6] The record establishes that *all* previous loans were included in the debt restructurings. (CR 117). Thus the loans used for work in other states were included in the restructurings.

[7] This Court has stated that "the basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate." *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 270 (1995), citing *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989).

limits the scope of the Federal Arbitration Act by a restrictive reading of Section 2. The court rejects a construction of Section 2 which would encompass transactions that "involve" or "affect" interstate commerce, instead embracing the view that an individual transaction, standing alone, must "substantially affect" interstate commerce to be within the reach of the FAA. This construction of Section 2 is contrary to the letter and spirit of the Act. The court's insistence upon examining the minutia of an individual transaction for substantial relation to interstate commerce is incorrect and at odds with established FAA jurisprudence. Further, the Alabama court's test for interstate commerce is inconsistent with other state and federal courts.

I. THE DECISION BELOW APPLIES A TEST THAT IS CONTRARY TO THIS COURT'S PRECEDENTS AND THAT CONTRAVENES THE LANGUAGE AND PURPOSE OF SECTION 2.

Alabama's development of a test for substantial interstate nexus in *Sisters of the Visitation* is diametrically opposed this Court's precedent and to the purposes of the FAA. The Alabama Supreme Court initially embraced a "slightest nexus" test for interstate commerce. *Ex parte Costa & Head*, 486 So.2d 1272, 1275 (Ala. 1986) ("The requirement of the FAA that an arbitration agreement 'involve commerce' has been construed very broadly so that the slightest nexus of the agreement with interstate commerce will bring the agreement within the ambit of the FAA."). The court later rejected that analysis, as manifested in its 1993 ruling that the FAA was inapplicable where the parties did not "contemplate" substantial interstate activity at the time

they entered the contract.[8] *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 628 So.2d 354, 356 (Ala. 1993). On certiorari, this Court, noting that the FAA embodies "a national policy favoring arbitration," *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), reversed the Alabama Supreme Court. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995). The Court rejected "contemplation of the parties" and instead adopted a "commerce in fact" analysis. *Allied-Bruce*, 513 U.S. at 281 ("[W]e accept the 'commerce in fact' interpretation, reading the Act's language as insisting that the 'transaction' in fact 'involv[e]' interstate commerce, even if the parties did not contemplate an interstate commerce connection"). This Court also expounded upon the very broad reach of the words "involving commerce" found in Section 2. *Allied-Bruce*, 513 U.S. at 273-74 ("involving commerce" covers more than only activities within the flow of commerce; concluding that "involving" is the functional equivalent of "affecting").

Three months after deciding *Allied-Bruce*, this Court decided *United States v. Lopez*, 514 U.S. 549 (1995), involving the constitutionality of The Gun-Free School Zones Act (which made it a federal crime "for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone."). This Court determined that the law was beyond Congress' authority under the Commerce Clause, primarily because the statute did not regulate commercial activity and did not require any connection to interstate commerce. *Lopez*, 514 U.S. at 551. The Alabama Supreme Court has seized upon language in *Lopez* to limit application

[8] The court adopted this "contemplation of the parties" test because it promoted the court's "strong public policy" against predispute arbitration agreements. *Lopez v. Home Buyers Warranty Corp.*, 628 So.2d 361, 363 n.2 (Ala. 1993).

of the FAA to individual economic transactions that have no "substantial" effect on interstate commerce.

A. The Alabama Supreme Court improperly reads *Lopez* as requiring that a commercial transaction must not only "involve" or "affect" interstate commerce under Section 2 of the FAA, (as set forth in *Allied-Bruce*), but must "substantially affect" interstate commerce.

Following *Allied Bruce* and *Lopez*, and relying on both cases, the Alabama Supreme Court decided *Sisters of the Visitation*. The court recognized the holding of *Allied-Bruce* that, to involve interstate commerce, a transaction must "in fact" involve interstate commerce. The court also noted language in *Lopez* stating that for Congress to regulate an activity under the Commerce Clause, the effect of that activity upon interstate commerce must be "substantial." The Alabama court then determined that, although the *Lopez* "substantial effect" language was dictum, the court would nevertheless follow that language in analyzing the scope of the FAA:

> The [United States Supreme Court]...stated that for an economic activity to come within Congress's authority under the Commerce Clause the activity must "substantially affect" interstate commerce. The *Lopez* Court referred to the requirement of a substantial effect as generally applicable to regulation of economic activity. That broad reference, albeit dictum, does not suggest that the requirement of a substantial effect would not apply to the question whether a particular contract is subject to the FAA.

Sisters of the Visitation, 775 So.2d at 761. (internal citations and footnotes omitted). The Alabama Supreme Court adopted the *Lopez* "substantial affect" language as applicable to all interstate commerce inquiries under the FAA.[9] Currently in Alabama, to come within the purview of the FAA, an individual transaction must not only "in fact" involve commerce, but must also "substantially affect" interstate commerce under the five-part test enunciated in *Sisters of the Visitation*.

The reasoning of the court and its holding are at odds with this Court's precedent. *Lopez* involved no economic activity. This Court determined the criminal statute was beyond Congress's power to enact because the statute "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce." *Lopez*, 514 U.S. at 551. *Lopez* concerned purely intrastate acts, and the issue was not what quantum of evidence would satisfy an interstate commerce jurisdictional prerequisite. Rather, the issue was whether Congress had the authority to pass the law.

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[9] This decision inexplicably departed from prior Alabama Supreme Court decisions taking the exact opposite view. In *Hurst v. Tony Moore Imports*, 699 So.2d 1249, 1257 (Ala. 1997), the court stated:

> However, we do not view *Lopez* as signaling a retreat by the Supreme Court from its expansive interpretation of "interstate commerce" in cases clearly involving commercial transactions. The Court's opinions discussing the reach of the Commerce Clause seem to hold that almost any commercial transaction undertaken may "affect" interstate commerce, no matter how slightly, and therefore can be regulated by Congress. These cases stand for the proposition that if *any* effect on interstate commerce can be found in a commercial transaction, then the transaction is considered to be one involving interstate commerce." (internal citations and footnotes omitted).

Additionally, the *Lopez* case was decided only three months after *Allied-Bruce*. This Court did not mention *Allied-Bruce* when it stated in *Lopez* that an activity must "substantially affect interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause." *Lopez*, 514 U.S. at 559. The Supreme Court of Alabama continues to issue opinions stating that a transaction must have a "substantial" effect upon interstate commerce to invoke the FAA. See, e.g., *Parkway Dodge, Inc. v. Hawkins*, 2003 WL 257409 *3 (Ala.) (to satisfy the interstate commerce criterion, "the involvement of, or effect on, interstate commerce must be substantial"), quoting *Chesser v. AmSouth Bank, N.A.*, 2002 WL 31151340 *3 (Ala.); *Rogers Found. Repair, Inc. v. Powell*, 748 So.2d 869, 871 (Ala.1999)). This position taken by the Alabama Supreme Court means that *Lopez* had to modify *Allied-Bruce*, something this Court has not indicated it intended to do. In fact, after *Lopez* this Court reaffirmed the breadth of the interstate commerce nexus set forth by *Allied-Bruce* and its predecessors. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001) (reaffirming the broad reach of the words "involving commerce" and citing *Allied-Bruce* for the proposition that Section 2 implements Congress' intent to exercise its power "to the full."). Thus, to give effect to the Alabama Supreme Court's decision would require one to ignore *Allied Bruce* in favor of dicta in *Lopez*.

B. The decision below improperly focuses upon individual commercial transactions, rather than their effects in the aggregate.

In *Wickard v. Filburn*, 317 U.S. 111 (1942), this Court held that Congress could, consistent with the Commerce Clause, regulate wheat produced by a farmer for personal consumption on his own farm. Even though the

farmer's impact upon the overall demand for wheat "may be trivial," where "his contribution, taken together with that of many others similarly situated" is not trivial, Congress could regulate the activity consistent with the Commerce Clause. *Wickard*, 317 U.S. at 127-28. This Court thus upheld the aggregation approach to testing the effect of a commercial activity upon interstate commerce, as opposed to testing the isolated activity in a vacuum. See also *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 277 (1981) ("As we explained in *Fry v. United States*, 421 U.S. 542 [(1975)], '[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, *combined with like conduct by others similarly situated*, affects commerce among the States or with foreign nations.'") (emphasis added). The *Wickard* Court also rejected any distinction between conduct that directly affects interstate commerce and that which only indirectly affects interstate commerce, holding that purely local activity may be reached by Congress regardless of whether its effect on interstate commerce is considered direct or indirect.[10] *Wickard*, 317 U.S. at 125.

Alabama, however, now follows quite the opposite approach. Rather than considering the aggregate effects of large commercial loan transactions such as this one upon interstate commerce, (involving, as here, construction loan proceeds crossing state lines), the Alabama court insists that the focus must be upon each individual transaction and its reach. As Alabama Supreme Court Justice See noted, following *Wickard* and its "aggregation" approach, this Court did not overturn a congressional act on the grounds that it

[10] Earlier, the Court had stated that where the effect of intra-state transactions upon interstate commerce was merely indirect, Congress could not regulate those transactions. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935). The *Wickard* Court eliminated a distinction between direct and indirect effect.

exceeded Commerce Clause authority for some fifty years. See *McConnell Auto Corp. v. Jackson*, 2002 WL 31439766 *9 (Ala.) (dissenting opinion). Justice See's words in *McConnell* (echoed in the Citizens Bank opinion below) summarize how the Alabama Supreme Court has departed from established Commerce Clause and FAA jurisprudence:

> The Supreme Court of the United States stated in *Lopez* that in order for a federal statute that regulates commercial transactions to be a valid exercise of Congress's Commerce Clause power, the aggregate nationwide participation in that activity—not the individual transaction in isolation—must "substantially affect" interstate commerce. [*Lopez*, 514 U.S. at 556-57]. This "substantial-effect" test—used to determine the constitutionality of a statute under the Commerce Clause—was not a new standard created in *Lopez* but has been the test of a statute's constitutionality since the early twentieth century. *Id.* at *555-57.* Once it has been determined that Congress acted within its Commerce Clause power in enacting a statute, whether that statute reaches certain activities does not depend on whether that individual act, when considered separately from all similar acts, has a substantial effect on commerce. As *Wickard* made clear, Filburn's "trivial" wheat production could be reached by the Agricultural Adjustment Act. The standard established by the Supreme Court of the United States is that "'where *a general regulatory statute bears a substantial relation to commerce,* the *de minimis* character of individual instances arising under that statute is of no consequence.'" *Lopez*, [514 U.S. at

558] (quoting *Maryland v. Wirtz*, [392 U.S. 183, 197 n.27 (1968)]). The standard for the application of the FAA to an individual contract was made clear to us in [*Allied-Bruce*]. . .[T]he requirement in the FAA that an individual contract involve interstate commerce should be read in the broadest possible terms because the word "involving" signals "an intent to exercise Congress' commerce power to the full." [*Allied-Bruce*, 513 U.S. at 277]. The Court also stated that to be subject to the FAA a contract did not have to evidence a transaction that was "'substantially' interstate." [*Allied-Bruce*, 513 U.S. at 269]. Thus, I believe this Court erred when it held in *Sisters of the Visitation* that a particular contract, in order to be enforceable under the FAA must, by itself, have a substantial effect on interstate commerce . . ."

McConnell at *11.

In the present case, the Alabama Supreme Court denied arbitration by imposing a substantiality requirement neither intended by the FAA nor enunciated by this Court. The court now requires that a discrete transaction, such as the loan restructurings in the present case, must individually substantially affect interstate commerce. Such a ruling necessarily overwrites established FAA jurisprudence by modifying *Allied-Bruce* and overwriting *Wickard*. The lower court has taken *Lopez*, a case that did not involve commerce or economic activity whatsoever, and has superimposed its "substantiality" language upon every FAA analysis via the *Sisters of the Visitation* five-part test. As a result, the court has advanced its "strong public policy"

against arbitration, a position directly opposed to the purpose of the FAA.

II. THE DECISION BELOW CONFLICTS WITH THE VIEW OF OTHER STATE AND FEDERAL COURTS ON THE SCOPE OF "INVOLVING COMMERCE" UNDER SECTION 2.

Because Alabama now utilizes a test for interstate commerce that focuses solely upon a discrete transaction, and requires a substantial nexus between that transaction and interstate commerce, the state has departed from the correct approach followed by other state and federal courts interpreting Section 2 of the FAA. Those courts have determined that in the context of *commercial* activity, *Lopez* did not restrict the principles of *Allied-Bruce*. For example, the Supreme Court of Texas has specifically ruled that *Lopez* did not modify the "involving" or "affecting" test for interstate commerce, noting that this Court did not suggest in any way that it had changed its view of Congress' commerce power over economic activities. *In re L&L Kempwood Associates, LP*, 9 S.W.3d 125, 127 (Tex. 1999), see also *In re Education Management Corp., Inc.*, 14 S.W. 3d 418, 424 (Tex.App.-Houston 2000) (FAA does not require a substantial effect on interstate commerce; rather, it requires only that commerce be involved or affected); but see *In re Turner Bros. Trucking Co.,Inc.*, 8 S.W.3d 370, 375-76 (Tex.App.-Texarkana 1999) (concluding that, after *Lopez*, burden is to prove a substantial effect on interstate commerce). The Ninth Circuit distinguishes between economic and non-economic activity. For example, in *United States v. Woodruff*, 941 F.Supp. 910, 923 (N.D.Cal. 1996), the federal district court had ruled in a criminal case that *Lopez* eliminated the *de minimis* approach to interstate commerce jurisdictional inquiries. The Ninth Circuit reversed, *United States v. Woodruff*, 122 F.3d 1185 (9th Cir.

1997), holding that a Hobbs Act conviction was properly analyzed under the *de minimis* effects test because, unlike the statute at issue in *Lopez*, the Hobbs Act was directly aimed at *commercial* activity.

Other courts correctly distinguish between the "substantial effects" upon interstate commerce necessary for Congress to regulate purely *intra*state activity, as opposed to the "involving" or "affecting" test to satisfy an *inter*state jurisdictional prerequisite. See, e.g., *U.S. v. Nachef*, 1998 WL 151270 *5 (D.Mass.) ("*Lopez* itself makes clear that the 'substantiality' holding applies only to the regulation of purely *intrastate* economic activity, and that where a statute contains an express jurisdictional element, as is true of the Hobbs Act, the regulated activity is, *by definition, interstate.*"), citing *United States v. Harrington*, 108 F.3d 1460, 1465-66 (D.C. Cir. 1997) (wherein the court cited *Allied-Bruce* for the proposition that "substantiality" does not apply to a jurisdictional element of interstate commerce); *Haeberlin Farms, Inc. v. IGF Insurance Company*, 641 N.W.2d 816, 822-23 (Iowa 2002) ("The Supreme Court has made it clear that, when a statute regulates purely economic matters, as in *Wickard,* it is not subject to the constitutional infirmities of the statutes in *Lopez* and *Morrison.*") By including an interstate jurisdictional prerequisite in the FAA, Congress is by definition regulating only interstate economic activity, which means the relationship to interstate commerce of the subject transaction need not be "substantial."

These rulings are consistent with caselaw from jurisdictions construing the FAA and its reach broadly. As a rule, most courts look not only to the transaction itself, but also beyond the transaction to the circumstances and the parties to determine whether interstate commerce is in any way "involved." E.g., *Government of Virgin Islands v. United Indus. Workers, N.A.*, 169 F.3d 172, 176-77 (3rd Cir.

1999) (noting the "scant" evidence of interstate commerce, but holding interstate commerce was satisfied because one of the parties, UIWNA, "is an international body embracing Union workers not only in the various states of the union, but in foreign countries as well" and because "its activities, by their very nature, qualify as having an interstate nexus."). (Contrast the instant case, wherein the Alabama Supreme Court refused to consider the parties and the nature of their respective businesses, instead focusing solely upon the restructured promissory notes in a vacuum).[11] See also *Zabinski v. Bright Acres Associates*, 553 S.E.2d 110, 117-18 (S.C. 2001) (noting the expansive view of the FAA and holding that, although the development of land is a purely intrastate activity, the transaction "involved" interstate commerce because the partnership utilized out-of-state materials, contractors, and investors), citing *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 239 S.E.2d 647 (S.C. 1977) (holding that a construction contract involved interstate contract where materials, equipment, and supplies were produced and manufactured out-of- state); see also *McIntosh v. Tenet Health Systems Hospitals, Inc.*, 48 S.W. 3d 85, 88 (Mo.App. 2001) (holding that employee's "tangential" affect upon employer's business activities satisfied the FAA, where the employer treated out-of-state patients, received goods and services from out-of-state vendors, and received reimbursement from out-of-state entities.).

Alabama, on the other hand, has sharply deviated from this Court and lower courts in adopting its *Sisters of the*

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[11] This was the view urged by Alafabco's counsel in the trial court proceedings. He stated: "The fact that [Citizens Bank does] business with anybody in the world, has no affect on this particular client who is locally owned. . .The fact that they bring deposits in from all over the world and the fact that they deal with companies all over the world, as far as the bank goes, it doesn't have any bearing on whether this particular transaction substantially affects interstate commerce. (Vol. II, Tr. 57-58).

Visitation "substantial effect" test. In the present case, Citizens Bank presented evidence that it held a security interest for the subject loans in Alafabco's accounts receivable (including out-of-state receivables) and in its equipment and inventory (including those manufactured in part in other states). The bank's commercial loan business in the aggregate is substantial, involving millions of dollars extended to commercial businesses. Further, Citizens Bank itself is governed by federal regulations and laws, as its business certainly affects interstate commerce. Despite this and other evidence, the Alabama Supreme Court applied *Sisters of the Visitation*, a case giving only narrow effect to Section 2 of the FAA, and found no "substantial" nexus between the individual debt restructuring transactions and interstate commerce. This ruling and the court's analysis are contrary to the language of the FAA, the purpose of the FAA, this Court's rulings on the FAA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

Supreme Court of Alabama

Special Term, 2002

1010703

Alafabco, Inc.

v.

The Citizens Bank et al.

Appeal from Lawrence Circuit Court
(CV-00-261)

WOODALL, Justice.

Alafabco, Inc., appeals from the trial court's order granting the motion of The Citizens Bank and its employees to compel arbitration of this dispute. We reverse and remand.

I. Factual Background

The relationship between the parties and the genesis of this dispute were briefly summarized in a complaint filed on November 15, 2000, by Alafabco, Inc., and three of its officers or employees, namely, Donnie Cottingham, Joann Beck, and Weston Beck, against the Bank and a number of its employees, including Doug Alexander, Roger Campbell, and Wayne Gentry (hereinafter referred to collectively as "the Bank"). In pertinent part, the complaint alleged:

"6. In 1986, the plaintiffs and defendants entered into a quasi-contractual relationship wherein the plaintiffs secured construction contracts and the defendants provided the necessary operating capital to complete the project. Upon completion of a project, the plaintiffs repaid the funds, together with accrued interest to the defendants.[1]

"7. The plaintiffs continued to operate under the implied agreement until 1998, at which time the defendants encouraged plaintiffs to bid on a large project [for Champion International (the full and correct name of this company is not clear from the record) at its facilities in Courtland, Alabama,] and then, when plaintiffs bid was accepted and plaintiffs began work, the defendants refused to provide the necessary operating capital for the completion of the contract. As a result of the defendants' breach of the agreement, the plaintiffs began to incur massive debt."

According to Alafabco, it attempted to compensate for the alleged breach by "using the monies provided by The Bank in the prior funding." Appellant's Brief, at 4. Nevertheless, it "became delinquent in repaying its existing obligations to [the] Bank." Appellant's Brief, at 4. Subsequently, the parties negotiated an agreement, pursuant to which "all of the loans with the Plaintiffs were restructured and redocumented through various notes dated May 3, 1999."

[1] The bank loans were secured by invoice numbers of the jobs to be performed by Alafabco. Appellant's Brief, at 3.

Appellees' Brief, at ix. Along with the "renewal notes" executed as a result of these negotiations, the parties signed a document containing the following pertinent provisions:

> "AGREEMENT TO ARBITRATE. The Citizen Bank ('Lender') and the undersigned agree that all disputes, claims, or controversies ('Disputes') between them, whether individual, joint, or class in nature, including contract and tort disputes and any other matter at law or equity, shall be resolved by arbitration upon request of either party at any time, notwithstanding the prior filing by either party of any legal action, except as otherwise indicated in this Agreement or agreed to in writing by the parties. In an arbitration, an arbitrator, who is an independent, neutral party, gives a decision after hearing the positions of the parties. It is understood and agreed that arbitration pursuant to this agreement shall be binding upon both parties and that both parties are waiving their respective rights to a jury trial. However, nothing in the loan documents or this agreement shall preclude any party from seeking equitable relief from a court of competent jurisdiction.
>
> "GOVERNING LAW. The Federal Arbitration Act shall apply to the construction, interpretation, and enforcement of this arbitration agreement. The arbitration of any dispute shall be governed by the Rules of the

> American Arbitration Association. If there is an inconsistency between these rules and this Agreement, this Agreement shall govern."

Subsequently, Alafabco defaulted on its payments under the "renewal notes," and, it alleges, the Bank published notices of foreclosure on its property. Consequently, Alafabco sought bankruptcy protection in the United States Bankruptcy Court for the Northern District of Alabama. That action was settled and Alafabco's petition in bankruptcy was dismissed.

However, that settlement involved a second debt restructuring, evidenced by a second set of renewal notes executed December 10, 1999. At that time, the amount allegedly due the Bank was approximately $430,000. The debt restructuring involved a note of the individual plaintiffs, secured by a mortgage on commercial real estate owned by Cottingham and the Becks; a note of Alafabco, secured by accounts receivable, inventory and supplies, fixtures, machinery and equipment, and motor vehicles; and a mortgage on Cottingham's house. That same day, the parties also executed an arbitration agreement containing provisions functionally identical to the arbitration agreement signed on May 3, 1999 (the May 3, 1999, arbitration agreement and the December 10, 1999, arbitration agreement are hereinafter referred to collectively as "the Arbitration Agreements").

The plaintiffs' 18-count complaint, filed nearly a year after the execution of the second set of renewal notes, sought compensatory and punitive damages under multiple theories, including breach of contract, fraud, breach of fiduciary duties, defamation, conspiracy, intentional infliction of

emotional distress, and interference with a contractual or business relationship. The Bank moved to compel arbitration of the dispute, based on the Arbitration Agreements. The trial court granted the motion, and Alafabco appealed.

II. Discussion

On appeal, Alafabco contends that the Arbitration Agreements are unenforceable because, it argues, the transaction at issue does not have a nexus with interstate commerce sufficient to invoke the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("the FAA"). The Bank's first response is that the agreements are enforceable whether or not the transaction has a connection with interstate commerce. This is so, because, it argues, this case involves postdispute agreements, which, it contends, are not contrary to state law. More specifically, it states: "[T]he Plaintiffs entered into the Arbitration Agreements after they had already defaulted on their various obligations to the Bank. ... As a material consideration to the restructuring of [their] obligations, the plaintiffs agreed to submit any dispute heretofore or thereafter arising ... to binding arbitration." Appellees' Brief, at 2 (emphasis added). "Therefore," the Bank continues, "the Arbitration Agreements . . . were executed after a dispute had already arisen and were not subject to the[interstate-commerce] restriction" as would be the case had they been executed before the dispute. Appellees' Brief, at 4. We disagree with the Bank -- not with its characterization of the chronology of events,[2] but with its conclusions.

[2] In fact, we need not -- and do not -- decide whether the Arbitration Agreements are predispute or postdispute agreements.

Unlike predispute arbitration agreements, which contravene Ala. Code 1975, § 8-1-41(3), postdispute arbitration agreements are enforceable in Alabama, either under the Alabama Arbitration Act, Ala. Code 1975, §§ 6-6-1 to -16 ("the AAA"), or at common law. Ala. Code 1975, § 6-6-16; Fuerst v. Eichberger, 224 Ala. 31, 33, 138 So. 409, 410 (1931); Rodney Max, "Arbitration -- the Alternative to Timely, Costly Litigation," 42 Ala. Lawyer 309, 317-18 (1981). However, there is no evidence in this case of an agreement to proceed under the AAA or the common law. On the contrary, the Arbitration Agreements provided: "The Federal Arbitration Act shall apply to the construction, interpretation, and enforcement of this Agreement." (Emphasis added.)

Moreover, the Bank did not propose in the trial court to arbitrate outside the framework of the FAA. On the contrary, it based its "Motion to Stay Action and Compel Arbitration" on the FAA, stating: "An Agreement which contains specific provisions requiring parties to Arbitrate disputes involving or [a]ffecting interstate commerce is specifically enforceable under the Federal Arbitration Act, 9 U.S.C. Section 1, et seq.; Allied-Bruce Terminix Companies v. Dobson, 115 S. Ct. 834 (1995)." It then cited various examples of how, in its view, "the dealings of the parties ... substantially contemplated and impacted upon interstate commerce."

It repeated those contentions in its "Brief in Support [of the Motion] to Compel Arbitration." There, it also argued that this case is distinguishable from Sisters of the Visitation v. Cochran Plastering Co., 775 So. 2d 759 (Ala. 2000), in

which this Court determined, applying a five-part test, that the transaction at issue there did not substantially affect interstate commerce, and, therefore, that an arbitration agreement was not enforceable under the FAA. In this case, neither the motion nor the supporting brief refers to the AAA or to arbitration under the rules of common law. Clearly, the parties did not contemplate arbitration under the authority of the AAA or the common law of Alabama. Consequently, arbitration of this dispute must proceed, if at all, under the FAA.

The FAA preempts Alabama law disfavoring predispute arbitration agreements only if the dispute is subject to a written arbitration agreement "relating to a transaction substantially affecting interstate commerce." Ex parte Greenstreet, Inc., 806 So. 2d 1203, 1209 (Ala. 2001); see also F.A. Dobbs & Sons, Inc. v. Northcutt, [Ms. 1991155, November 2, 2001] __ So. 2d __ (Ala. 2001). The proponent of arbitration bears the burden of proving a sufficient connection with interstate commerce, Brookfield Constr. Co. v. Van Wezel. [Ms. 1010353, June 28, 2002] __ So. 2d __, __ (Ala. 2002); TranSouth Fin. Corp. v Bell, 739 So. 2d 1110 (Ala. 1999), applying the five-part test set forth in Sisters of the Visitation.

In an attempt to carry this burden, the Bank presented the affidavit of Roger Campbell, its "president and chief executive officer." He recited the following factors as bearing on the interstate-commerce question:

> "The Citizens Bank is a lending institution which routinely conducts business in interstate commerce, such as the business

conducted between it and the Plaintiffs, at issue in this litigation. The business records attached as Exhibit A and Exhibit B clearly demonstrate that a substantial portion of the money loaned by [the Bank] to Alafabco was used to finance labor and materials used by Alafabco to perform work at a Champion International facility in North Carolina. Additionally, the security interest held by The Citizens Bank in assets of the Plaintiffs include inventory manufactured and created using sub-products obtained outside the state of Alabama, utilizing raw materials manufactured outside the state of Alabama and sold through utilization of the U.S. mails, telephones and other methods of communication through interstate commerce. The security interest of The Citizens Bank and accounts receivable of the plaintiff Alafabco, Inc., are distributed through the U.S. mails, payments are obtained through the U.S. mails and proceeds are deposited in bank accounts subject to Federal Regulations and clearance through interstate settlement procedures and policies. The debt restructuring at issue in this matter was carried out in the course of a proceeding in the United States Bankruptcy Court, a court which has a profound impact upon interstate commerce, in my judgment. Moreover, payments by and between the parties in connection with their dealing were made by check which were cleared by the Federal Reserve, using the U.S. mails and interstate financial settlement procedures and

institutions. In the course of dealings between the parties. The Citizens Bank mailed notices of foreclosure and other correspondence related to the dealing between the parties through the United States Postal Service. Further, the policies and procedures governing the actions of The Citizens Bank, its officers, employees and governing the transactions between the parties to this litigation were subject to regulation by Federal Agencies and Federal Laws. Further, the loans issued by The Citizens Bank and the debt restructuring at issue facilitated the operation of Alafabco, Inc., which did business affecting interstate commerce, and directly engaged in interstate commerce, including contract work in North Carolina and the state of Tennessee, as demonstrated by the attached records."

These recitations fall into six general categories, namely, (1) the nature of the Bank's business; (2) the nature of Alafabco's business; (3) the general "course of dealings between the parties"; (4) the use of various communication media in dealings between the parties; (5) the existence of federal regulations; and (6) the nature of the specific transaction at issue. We shall address these categories in the context of Sisters of the Visitation.

Recently, we stated:

> "The test adopted in Sisters of the Visitation focuses on the quantity and quality of involvement of foreign entities with the

> subject transaction. Specifically, the subjects of inquiry are (1) the 'citizenship of the parties,' (2) the origin of any 'tools and equipment' actually used in the transaction, (3) the 'allocation of cost of services and materials,' (4) the 'subsequent movement across state lines' of the 'object of the services, ' and (5) the 'degree of separability from other contracts.' 775 So. 2d at 765-67. An analysis applying these factors is 'necessarily fact intensive.' Id. at 765 n.5."

Brookfield Constr. Co. v. Van Wezel, [Ms. 1010353, June 28, 2002] __ So. 2d __, __ (Ala. 2002).

A. Categories One, Two, and Three

The Bank argues that the overall nature of its business operations, those of Alafabco, and the "course of dealings of the parties" supports arbitrability. We disagree with this argument. Indeed, these factors are largely irrelevant to an FAA interstate-commerce analysis.

The FAA renders enforceable any "written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, ... or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal ...." 9 U.S.C. § 2 (emphasis added). Thus, on its face, the FAA applies only to "transactions," "contracts," and "controversies."

The FAA defines "transactions" in the maritime context, as including "charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters ... which, if the subject of controversy, would be embraced within admiralty jurisdiction." '9 U.S.C. § 1 (emphasis added). The FAA focuses on the narrow concepts of acts, omissions, or agreements, not on the broader concepts on which the Bank focuses, such as the nature of the parties' businesses or the general "course of dealings between the parties." Thus, the facts that the Bank "routinely conducts business in interstate commerce"; that Alafabco owns and uses materials "manufactured outside the state of Alabama"; and that Alafabco operates its business with funds borrowed from the Bank cannot support arbitrability of this dispute.

Moreover, under §§ 1 and 2, the FAA applies only where the transaction affecting interstate commerce is the "subject of [the] controversy." The relevant transactions in this case are the debt restructurings of May 1999 and December 1999, evidenced by the renewal notes and the attendant Arbitration Agreements. Indeed, the Bank characterizes the dispute as "whether Alafabco was in default on the contract [s] between it and the Bank." Appellees' Brief, at 4. Thus, testimony regarding loans to Alafabco cannot support arbitrability, absent a showing that -- at a minimum -- they were part of the restructured debt, that is, that they were somehow involved in this dispute. For these reasons, the recitations related to categories one, two, and three do not establish that the transaction had a substantial effect on interstate commerce.

B. Categories Four and Five

The Bank argues that involvement of the various forms of communication recited in Campbell's affidavit, such as the United States Postal Service "and other methods of communication," as well as the existence of federal regulations governing loan transactions and deposits in general, can support arbitrability. We disagree with this argument also.

Much of the rationale in the preceding section weighs with equal force against this argument. Additionally, the substantial-effect test of Sisters of the Visitation logically contemplates the converse, namely, the de minimis effect. Thus, in Aronov Realty Brokerage, Inc. v. Morris, [Ms. 1001292, April 26, 2002] __ So. 2d __ (Ala. 2002), a plurality of this Court recently concluded that a $1,000 earnest-money deposit on the purchase of a condominium unit paid to Regions Bank, allegedly a foreign corporation, "was de minimis as compared to the entire purchase price [of $106,000 plus miscellaneous charges and fees]." ___ So. 2d at __. Consequently, the transaction did not satisfy the Sisters of the Visitation substantial-effect "test. This was true, even when considered in the aggregate with "combined payments to State Farm, also a foreign corporation, ... of $217 and $214 for contents insurance and flood insurance," and a $495 payment for a "home warranty through American Home Shield," also a foreign entity. Morris, __ So. 2d at __. The combined payments "represent[ed] less than one percent of the purchase price." Id. See also Ex parte Learakos, [Ms. 1000244, July 13, 2001] __ So. 2d __ (Ala. 2001) ("the ostensible transfer of the funds for the plaintiff's $1,000 earnest money payment from the drawee bank in Illinois to

the Alabama payee of the check drawn in Alabama [did] not establish a substantial effect of [a] real estate sale and purchase on interstate commerce").

The interstate communications services and sundry federal regulations on which the Bank seeks to rely touch this transaction so remotely and tangentially as to warrant no consideration. Holding that a transaction is subject to the FAA simply by virtue of the ordinary use of interstate communication media in its furtherance, or by Congressional regulation of some aspect of one party's business, would effectively transform every "local" transaction into a "national" one. As Sisters of the Visitation points out, such an approach is impermissible under our federal system of government. 775 So. 2d at 767 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).

C. Category Six

Finally, we address the Bank's contentions regarding the transaction at issue, specifically, Campbell's affidavit testimony that "the loans issued by The Citizens Bank and the debt restructuring at issue facilitated the operation of Alafabco, Inc., which did business affecting interstate commerce, and directly engaged in interstate commerce, including contract work in North Carolina and the state of Tennessee, as demonstrated by the attached records." This testimony touches on a valid consideration, and, if supported by the record, could afford a basis for arbitrability. This is so, because it suggests that part of the money specifically involved in the debt restructuring was used to finance operations in North Carolina and Tennessee.

In that connection, the record contains four invoices, three of which evidence interstate transactions. In particular, Alafabco invoice 676 in the amount of $39,574.36, dated August 21, 1995, is addressed to "Champion International, Main Street, Canton, NC." The subject of invoice 676 is "Doctor Blade Maintenance, Canton Mill," and the invoice includes an itemization of charges for materials, labor, lodging, and travel. Alafabco invoice 681 for $9,209, dated August 18, 1995, bears the same address. The subject of invoice 681 is the installation of a fan, and the prices are itemized as in invoice 676. Alafabco invoice 685 for $11,500 is addressed to Champion International, at its Courtland, Alabama, facility. Alafabco invoice 796, dated December 20, 1995, is addressed to "SCA Services, 6919 Flagstone Drive, Ooltewah, TN, " and is in the amount of $4,000. The subject of invoice 796 is "Agusta Newsprint Doctor Blade maintenance."

The record further contains an instrument dated August 23, 1995, evidencing the loan of $31,659.49 from the Bank to Alafabco, namely, "Loan Number 3068814." The instrument specifically references invoice 676. The maturity date of that loan was November 21, 1995, at which time a "single payment of all principal and interest [was] due." The record contains a similar instrument dated August 31, 1995, evidencing the loan of $21,130.01, namely, "Loan Number 3068897." Loan Number 3068897 specifically referenced invoice 681 and invoice 685, and exhibited a maturity date of November 29, 1995. On that date, a "single payment of all principal and interest [was] due." These loans apparently financed the transactions evidenced by invoices 676, 681, and 685.

However, those projects all occurred in 1995, three years before the occurrence of any of the events made the basis of Alafabco's complaint or of the alleged defaults that precipitated the debt restructuring. There is no evidence indicating that Alafabco defaulted on either of those loans. Thus, for all that appears, those transactions had nothing to do with this controversy. In other words, the Bank made no showing as to what portion --if any --of Loan Number 3068814 or Loan Number 3068897 remained unpaid at the time of the debt restructuring. It made no showing as to what portion – if any --of the restructured debt was attributable to the 1995 loans. Having thus failed to show the quantity and quality of involvement of the North Carolina and Tennessee projects with the subject transaction, it showed -- at most -- a mere "proximity of [the subject transaction] to contracts substantially affecting interstate commerce." Sisters of the Visitation, 775 So. 2d at 767. On the state of the record, in other words, the 1995 projects are wholly "separable" from the subject transaction. Id.

Moreover, under Sisters of the Visitation and its progeny, "the simple fact that loan proceeds are 'mobile' does not require the conclusion that all loan transactions are inherently interstate in nature." Alternative Fin. Solutions, LLC, v. Colburn, [Ms. 1001285, November 16, 2001] __ So. 2d __, __ (Ala. 2001). Compare American Gen. Fin., Inc. v. Branch, 793 So. 2d 738, 747 (Ala. 2000), cert. denied, __ U.S. __, 122 S. Ct. 342 (2001), in which evidence was presented that indicated that the relevant loan proceeds actually moved in interstate commerce, as did the payments. The Bank, however, made no showing that proceeds, or payments, moved in interstate commerce, that is, it made no

showing of arbitrability under the fourth Sisters of the Visitation factor ("subsequent movement across state lines").

III. Conclusion

In short, it is undisputed that the parties in this case are Alabama residents. The Bank did not show that any portion of the restructured debt was actually attributable to interstate transactions; that the funds comprising that debt originated out-of-state; or that the restructured debt was inseparable from any out-of-state projects. Consequently, the Bank failed to carry its burden of proof on the interstate-commerce issue.

For this reason, the trial court erred in granting the Bank's motion to compel Alafabco to arbitrate its dispute with the Bank. That order is, therefore, reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Houston, Lyons, Brown, Johnstone, Harwood, and Stuart, JJ., concur.

Moore, C.J., concurs in the result.

See, J., dissents.

SEE, Justice (dissenting).

I believe that the majority erroneously reverses the trial court's order compelling arbitration; therefore, I respectfully dissent.

I.

First, the arbitration agreement is not made invalid under Alabama law simply because it provides that "[t]he Federal Arbitration Act shall apply to the construction, interpretation, and enforcement of this arbitration agreement." In 1986, Alafabco, Inc., and The Citizens Bank entered into a quasi-contractual relationship in which the Bank agreed to loan Alafabco funds to complete certain construction projects. In 1998, Alafabco defaulted on its obligations to the Bank. Thereafter, the parties negotiated an agreement that provided for the restructuring and redocumenting of Alafabco's existing debt to the Bank. As part of the debt-restructuring negotiations, Alafabco and the Bank executed "renewal notes" dated May 3, 1999, and signed an "Agreement to Arbitrate." The arbitration agreement included the following provision:

> "GOVERNING LAW. The Federal Arbitration Act shall apply to the construction, interpretation, and enforcement of this arbitration agreement. The arbitration of any dispute shall be governed by the Rules of the American Arbitration Association. If there is an inconsistency between these rules and this Agreement, this Agreement shall govern."

After the restructuring, Alafabco again defaulted on

its loan, and the Bank began collection efforts. In September 1999, Alafabco filed a petition in bankruptcy pursuant to Chapter 11. The Bank moved for adequate protection of the property Alafabco had pledged to secure its obligations to the Bank. Alafabco and the Bank, both represented by counsel, negotiated a second debt-restructuring agreement, a second set of renewal notes dated December 10, 1999, and another arbitration agreement containing the same provisions as the May 3, 1999, arbitration agreement.

Alafabco sued the Bank on November 15, 2000, and the Bank moved to compel arbitration. Roger Campbell, president and chief executive officer of the Bank, and Doug Alexander, a vice president, submitted affidavits in support of the motion to compel arbitration. Campbell and Alexander both state in their affidavits that Alafabco was "provided with a completely free choice with regard to whether to simply allow The Bank to move forward with the legal rights it already possessed, or instead, to enter into the debt restructuring agreement at issue." They further state that, "[a]s a part of the debt restructuring agreement, alternative dispute resolution agreements were executed."

Alabama cases and statutes distinguish between predispute arbitration agreements, i.e., agreements executed before a dispute between the parties has arisen, and postdispute arbitration agreements, i.e., agreements to arbitrate executed after a dispute has arisen. While, under Alabama law, predispute arbitration agreements are unenforceable, agreements to arbitrate disputes that have already arisen are enforceable under the Alabama Arbitration Act (the "AAA") and at common law. Ala. Code 1975, § 6-

6-1 and § 6-6-16; Fuerst v. Eichberger, 224 Ala. 31, 33, 138 So. 2d 409, 410 (1931). Parties that enter into such postdispute arbitration agreements are aware of the nature of the complaint they are allowing to proceed to arbitration. Ex parte Alien, 798 So. 2d 668, 676 (Ala. 2001) (Moore, C.J., concurring in the result).

Alafabco and the Bank entered into their arbitration agreement after their dispute had arisen. Alafabco alleges in its complaint that the Bank breached its contract with Alafabco in 1998, thus causing Alafabco to "incur massive debt." Thereafter, because Alafabco's loans were delinquent, the parties negotiated the debt-reconstruction agreement that provided for the execution of the renewal notes and the arbitration agreement. The arbitration agreement provides: "The Eederal Arbitration Act shall apply to the construction, interpretation, and enforcement of this arbitration agreement."

The main opinion concludes that "there is no evidence in this case of an agreement to proceed under the AAA or the common law." I am unaware of any authority, and the majority cites none, that requires that for a contract to be enforceable under Alabama law, the parties must affirmatively assert that they choose to proceed under Alabama law. In fact, if this Court concludes that federal law does not apply in this case, then, unless the law of some other jurisdiction is implicated, the agreement is not lawless, but, instead, it is subject to the application of Alabama law. See Cherry, Bekaert. & Holland v. Brown, 582 So. 2d 502 (Ala. 1991) (stating that, while the parties normally are allowed to choose what law they wish to apply to their agreement, Alabama law will govern the agreement if the parties' choice

would run contrary to the public policy of Alabama), see also Restatement (Second) of Conflict of Laws § 187 (1977); 8 Samuel Williston, Williston On Contracts § 19:6 (Richard A. Lord, 4th ed. 1998).[3]

For the reasons I recite below, I believe that the Federal Arbitration Act governs this contract dispute, but, if, as the majority concludes, it does not, then, the agreement is governed by Alabama law. Under Ala. Code 1975, § 6-6-16, the parties entered a binding contract to arbitrate an existing dispute. They incorporated into their contract, by reference, the terms of the Federal Arbitration Act and the rules of the American Arbitration Association:

> "The Federal Arbitration Act shall apply to the construction, interpretation, and enforcement of this arbitration agreement. The arbitration of any dispute shall be governed by the Rules of the American Arbitration Association."

---

[3] Williston writes:

> "The reasoning behind the Restatement rule that where the parties have chosen a law that would render the contract invalid, their choice will not be applied unless it would have applied absent their agreement is that the parties would not purposely have chosen a law that would invalidate a bargain, and that their (apparently) mistaken choice should be ignored in favor of protecting their expectation that they entered an enforceable bargain."

8 Williston, § 19:6, at 161-63 (footnote omitted).

This Court should construe those terms to give effect to the intent of the parties to enter a binding agreement;[4] thus, I believe the contract incorporates by reference the rules under which the parties intended the arbitration agreement to be interpreted. I am unaware of any authority, and the majority cites no authority, that stands for the proposition that these rules of construction, interpretation, and enforcement run contrary to the public policy of Alabama.

II.

Second, the dispute the parties agreed to arbitrate "involves commerce" and is, therefore, subject to the Federal Arbitration Act.

This Court reviews de novo a trial court's denial of a motion to stay its proceedings pending arbitration. Tefco Fin. Co. v. Green, 793 So. 2d 755 (Ala. 2001); Green Tree Fin. Corp. v. Vintson, 753 So. 2d 497, 502 (Ala. 1999). This Court has held that "'to prevail on an assertion of arbitrability, the moving party is required to produce some evidence which tends to establish its claim,'" Jim Burke Auto., Inc. v. Beavers. 674 So. 2d 1260, 1265 (Ala. 1995) (opinion on application for rehearing) (quoting In re American Freight Svs. , Inc., 164 B.R. 341, 345 (D. Kan. 1994)), and "'has the burden of proving the existence - of a contract calling for

[4] See Homes of Legend, Inc. v. McCollough, 776 So. 2d 741, 746 (Ala. 2000)(stating that where there is a choice between a valid construction and an invalid construction, the court has a duty to accept the construction that will uphold, rather than destroy, the contract and that will give effect and meaning to all of its terms).

arbitration and proving that that contract involves a transaction affecting interstate commerce,'" Tefco Fin. Co. v. Green, 793 So. 2d at 758 (quoting Ex parte Caver, 742 So. 2d 168, 172 n.4 (Ala. 1999) (emphasis added)).

In Sisters of the Visitation v. Cochran, 775 So. 2d 759, 763 (2000), the Sisters of the Visitation had contracted with an in-state contractor to renovate a chapel located in Alabama and owned by the Sisters. Pursuant to an arbitration provision in the contract, the Sisters sought arbitration of their dispute with the contractor. In my dissent in that case, I noted that the majority held that the Federal Arbitration Act can apply to a contract only if that "individual transaction 'substantially affect[s]' interstate commerce." 775 So. 2d at 782. Since our decision in Sisters of the Visitation in March 2000, this Court has routinely denied a party the right to arbitration where that party has failed to prove that the individual transaction substantially affected interstate commerce. See Aronov Realty Brokerage, Inc. v. Morris, [Ms. 1001292, April 26, 2002] __ So. 2d __ (Ala. 2002) (denying arbitration in an action brought by the purchaser of a condominium unit against a real estate brokerage, a real estate agent, and the condominium association); Liberty Nat'l Life Ins. Co. v. Douglas, [Ms. 1000683, Feb. 8, 2002] __So. 2d__ (Ala. 2002) (refusing to compel arbitration where an employee of an insurance company sued her employer); Ex parte Kampis, [Ms. 1000099, Feb. 8, 2002] __ So. 2d __ (Ala. 2002) (denying arbitration in an action brought by the purchaser of a house against a contractor); Alternative Fin. Solutions. LLC v. Colburn, [Ms. 1001285, Nov. 16, 2001] __ So. 2d __ (Ala. 2001) (denying arbitration where borrowers brought an action against lenders challenging the legality of certain loans); and Ex parte Learakos. [Ms. 1000244, July 13, 2001] __ So. 2d __ (Ala. 2001) (denying arbitration in an

action brought by the purchaser of a house against a real estate company and its agents).

The Supreme Court of the United States stated in United States v. Lopez, 514 U.S. 549 (1995), that in order for a federal statute that regulates commercial transactions to be a valid exercise of Congress's Commerce Clause power, the aggregate nationwide participation in that activity -- not the individual transaction in isolation -- must "substantially affect" interstate commerce. Lopez, 514 U.S. 556-57. This "substantial-effect" test -- used to determine the constitutionality of a statute under the Commerce Clause -- was not a new standard created in Lopez, but has been the test of a statute's constitutionality since the early twentieth century. Id. at 555-57.

Once it has been determined that Congress acted within its Commerce Clause power in enacting a statute, whether that statute reaches certain activities does not depend on whether that individual act, when considered separately from all similar acts, has a substantial effect on commerce. As Wickard v. Filburn, 317 U.S. Ill (1942), made clear, Filburn's "trivial" wheat production could be reached by the Agricultural Adjustment Act. The standard established by the Supreme Court of the United States is that "'where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.'" Lopez, 514 U.S. at 558 (quoting Maryland v. Wirtz, 392 U.S. 183, 197 n.27 (1968)).

The standard for the application of the Federal Arbitration Act to an individual contract was made clear to us

in Allied-Bruce Terminix Cos. v.Dobson, 513 U.S. 265, 267 (1995). The Federal Arbitration Act provides in pertinent part that "a contract evidencing a transaction involving commerce ... shall be valid ...." 9 U.S.C. § 2 (emphasis added). The Supreme Court of the United States held in Allied-Bruce Terminix that the requirement of the Federal Arbitration Act that an individual contract involve interstate commerce should be read in the broadest possible terms because the word "involving" signals an intent to "exercise Congress' commerce power to the full." 513 U.S. at 277. The Court also stated that a contract, to be subject to the Federal Arbitration Act, did not have to evidence a transaction that was "substantially interstate." 513 U.S. at 269.

Thus, I believe this Court erred when it held in Sisters of the Visitation that a particular contract, in order to be enforceable under the Federal Arbitration Act must, by itself, have a substantial effect on interstate commerce, and this Court errs again today by applying the Sisters of the Visitation standard to this case.

Campbell states in his affidavit that "prior to May 3, 1999, [Alafabco] borrowed substantial funds from The Bank, on multiple occasions, for the purposes of covering business operation expenses, including labor and material expense for performing jobs for Champion International at that entities [sic] Kenton, North Carolina facility, as well as the Courtland, Alabama facility. These loans were not repaid at the time Alafabco began Chapter 11 bankruptcy proceedings." Campbell and Alexander both state in their affidavits that, "the loans issued by The Citizens Bank and the debt restructuring at issue facilitated the operation of

Alafabco, Inc., which did business affecting interstate commerce, and directly engaged in interstate commerce, including contract work in North Carolina and the state of Tennessee, as demonstrated by the attached records."

Attached to Campbell's affidavit are invoices of interstate transactions. The invoices indicate that Alafabco sold equipment and materials and provided services to Champion International in Canton, North Carolina, and Ooltewah, Tennessee.

Based on the foregoing evidence presented by the Bank in support of its motion to compel arbitration, I conclude that the Bank presented the requisite "'some evidence which tends to establish [its] claim,'" Jim Burke Auto., 674 So. 2d at 1265 (quoting In re American Freight Sys., Inc., 164 B.R. 341, 345 (D. Kan. 1994)), indicating that the Bank's loans to Alafabco "involve commerce." Therefore, I would affirm the trial court's decision to compel arbitration.

IN THE SUPREME COURT OF ALABAMA

November 27, 2002

1010703

Alafabco, Inc. v. The Citizens Bank et al (Appeal from Lawrence Circuit Court: CV-00-261)

ORDER

IT IS ORDERED that the application for rehearing filed in this cause is overruled.

Overruled – No Opinion

WOODALL, J. – Moore, C.J., and Houston, Lyons, Brown, Johnstone, Harwood and Stuart, JJ., concur; See, J. dissents.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court. Witness my hand this the 27th day of November, 2002.

Robert G. Esdale, Sr.

Clerk, Supreme Court of Alabama

IN THE CIRCUIT COURT OF LAWRENCE COUNTY, ALABAMA

ALAFABCO, INC.
Et al,

Plaintiffs,

vs. CASE NO. CV-2001-261-J

THE CITIZENS BANK, ET AL.

ORDER ON MOTION TO COMPEL ARBITRATION BY DEFENDANTS THE CITIZEN'S BANK, DOUG ALEXANDER, ROGER CAMPBELL, AND WAYNE GENTRY

This matter comes before the Court on the Motion of the Defendants, The Citizen's Bank, Doug Alexander, Roger Campbell and Wayne Gentry, seeking to Stay the above styled action, and to compel arbitration, and the parties having appeared in open Court on the date scheduled for Hearing, and the Court having considered the Motion, briefs, evidentiary submissions, testimony and evidence offered at the hearing, in support of an in opposition to said Motion, the Court finds that the Motion is due to be and hereby is GRANTED.

From the foregoing, the Court finds as follows:

1. Based upon the evidence, the Court finds that the transactions which are the subject matter of this litigation had a substantial impact upon interstate commerce; Lopez v. Home Buyer's Warranty Corp., 670 So.2d 35 (Ala. 1995);

2. The Court finds that Plaintiffs entered into valid arbitration agreements with the Defendant, The Citizen's Bank, and that the Defendants Doug Alexander, Roger Campbell and Wayne Gentry, as "agents, employees, officers, and directors" were intended beneficiaries of the arbitration agreement. This finding specifically does not include the Defendant Charles C. Coffey, whose Motion to Compel Arbitration is the subject of a separate Order.

3. It is therefore Ordered by the Court that these proceedings are stayed as to the Defendants, The Citizen's Bank, Doug Alexander, Roger Campbell, and Wayne Gentry, and that Plaintiffs are compelled to submit their claims against said Defendants to arbitration in accordance with the Arbitration Agreements entered into between the parties.

DONE AND ORDERED this the 18th day of September, 2001.

George Craig
Special Circuit Judge

(2)

No. 02-1295

Supreme Court, U.S.
FILED
MAR 31 2003
CLERK

In The
Supreme Court of the United States

THE CITIZENS BANK,

Petitioner,

v.

ALAFABCO, INC., DONNIE COTTINGHAM, JOANN BECK and WESTON BECK,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF IN OPPOSITION

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22 pp

QUESTION PRESENTED

Did the Alabama Supreme Court properly reject an interpretation of the Federal Arbitration Act so expansively broad as to characterize a local commercial transaction alleged to come within its purview as "interstate" in nature merely because a strained analysis of the transaction and parties thereto revealed exposure to activity "involv[ing] interstate commerce" common to any commercial activity?

CORPORATE DISCLOSURE STATEMENT

Alafabco, Inc. has no parent company. Alafabco, Inc. has issued no shares to the public. Therefore, no publicly held company owns any stock in Alafabco, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	7
REASONS FOR DENYING THE PETITION	8
I The Alabama Supreme Court's Ruling Does Not Conflict With *Allied-Bruce Terminix Companies v. Dobson*	8
II The "Substantial Effect" Test Employed by The Alabama Supreme Court Is Consistent With This Court's Decision in *U.S. v. Lopez*	10
III The Alabama Supreme Court's "Interstate Commerce" Test in *Sisters of the Visitation v. Cochran Plastering Company* Correctly Integrates This Court's Decisions in *Allied-Bruce Terminix Companies v. Dobson* and *U.S. v. Lopez* and Was Properly Applied in The Case Below	13
CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES:

Allied-Bruce Terminex Companies v. Dobson, 513 U.S. 265 (1995).....*passim*

Sisters of the Visitation v. Cochran Plastering Company, 775 So.2d 759 (Ala. 2000).....*passim*

U.S. v. Lopez, 514 U.S. 549 (1995).....*passim*

Wickard v. Filburn, 317 U.S. 111 (1942).....13, 14

STATUTE:

Federal Arbitration Act, 9 U.S.C. § 2.....1, 7, 13

STATEMENT OF THE CASE

This case involves the Alabama Supreme Court's interpretation of Section 2 of the Federal Arbitration Act (9 U.S.C. § 2) in light of this Court's decisions in *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265 (1995) and *U.S. v. Lopez*, 514 U.S. 549 (1995). The Alabama Supreme Court attempted to give effect to both decisions of this Court in *Sisters of the Visitation v. Cochran Plastering Company*, 775 So.2d 759 (Ala. 2000), which held that *Lopez*, in dicta, had required a commercial transaction to have a "substantial effect" on interstate commerce before it was subject to regulation. The Alabama Supreme Court held that the "substantial effect" test was applicable to the Federal Arbitration Act and set out a five-pronged test to determine whether a commercial activity had a "substantial effect" on interstate commerce in order to be enforceable under the Federal Arbitration Act. This five-pronged test examined the following areas:

I. Citizenship of the Parties.
II. Tools and Equipment.
III. Allocation of Cost of Services and Materials.
IV. Subsequent Movement Across State Lines.
V. Degree of Separability From Other Contracts.

While the Alabama Supreme Court recognized that "developing a test for determining whether a particular contract has a substantial effect on interstate commerce is difficult," it nevertheless concluded that development of such a test was "essential, because we cannot appropriately say of such an effect, as Justice Stewart suggested we might be able to say of hard-core pornography, 'I know it when I see it' [internal citation omitted]." *Sisters of the Visitation*, at 764.

In the instant case for which Petitioner seeks certiorari, the dispute arose over a series of commercial loan transactions between Petitioner, Citizens Bank, and Respondents, Alafabco, Inc., Donnie Cottingham, Joann Beck, and Weston Beck in which Petitioner loaned Respondents money for various "business operating expenses on construction contracts." (Pet. at 4). As stated by Petitioner, "Alafabco defaulted on its various [original] loan obligations to Citizens Bank and the bank began collection efforts." (Pet. at 4). Citizens Bank and Alafabco, through respective counsel, then negotiated a restructuring of the debt in which "Alafabco provided a security interest in all of its business assets, including accounts receivable, inventory, equipment and motor vehicles." (Pet. at 4). As a part of the overall restructuring, "Three of Alafabco's officers provided personal notes secured by mortgages (Vol. Ex., 6, H) [and] [e]ach debtor also executed on arbitration agreement . . ." (Pet. at 4), which is set out in relevant part in the Petition on pages 4-5. This agreement set out that "The Federal Arbitration Act shall apply to the construction, interpretation, and enforcement of the arbitration agreement. . . ." (Pet at 5).

Subsequently, Alafabco again defaulted on the notes and sought protection by filing a Chapter 11 Bankruptcy Petition in the United States Bankruptcy Court for the Northern District of Alabama. (Pet. at 5). As set out in Petitioner's "Statement of the Case" at page 6 of the Petition:

> Citizens Bank [then] filed a motion in the Bankruptcy Court for adequate protection regarding Alafabco's continued use of the loan collateral. The Bankruptcy Court [in response] entered an order under which Alafabco stipulated to a perfected security interest and lien upon its assets. [internal citations omitted]. The parties once again restructured the loan obligations, executed new loan documents dated December 10, 1999, and the bankruptcy proceedings were dismissed. [internal citations omitted]. This second debt restructuring involved a total amount of approximately $430,000 secured by commercial real estate owned by the individual officers, as well as the business assets of Alafabco. All debtors again signed arbitration agreements virtually identical to the [original] ones. [internal citation omitted].

Due to Petitioner's egregious conduct during the course of its dealings with Respondents, Alafabco subsequently "sued Citizens Bank and three of its officers under various theories including breach of fiduciary duty, breach of implied contract, misrepresentation, negligence, and intentional infliction of emotional distress. [internal citations omitted]." Petitioner then "moved the trial court to compel arbitration pursuant the arbitration agreements executed by each debtor [internal citations omitted]." (Pet. at 6).

As stated in the Petition at page 8, "The trial court found that the loan transactions at issue involved interstate commerce, and entered an order staying the proceedings and compelling arbitration of Alafabco's claims against Citizens Bank. [except, as noted in Petition, as against defendant Charles Coffey] [internal citations omitted]."

Alafabco subsequently appealed the trial court's ruling compelling arbitration to the Alabama Supreme Court. The Alabama Supreme Court reversed the trial court, holding that Respondent Citizens Bank failed to

meet the five-pronged test established in *Sisters of the Visitation*. The Court quite forcefully rejected Petitioner's arguments based on alleged nexi to interstate commerce, considering them extremely remote. Specifically, the Alabama Supreme Court addressed and then rejected what it characterized as "six general categories" by which Petitioner attempted to establish nexi that would justify enforcement of the arbitration agreements under an interstate commerce analysis. The Alabama Supreme Court characterized these "six general categories" as:

> (1) the nature of the Bank's business; (2) the nature of Alafabco's business; (3) the general "course of dealing between the parties"; (4) the use of various communication media in dealings between the parties; (5) the existence of federal regulations; and (6) the nature of the specific transaction at issue. The Alabama Supreme Court then proceeded to an analysis of "these categories in the context of *Sisters of the Visitation*." (Pet., App. A at A9).

The Alabama Supreme Court rejected all six categories of argument offered by Petitioner. Specifically, it rejected categories 1-3, finding that "the overall nature of [Petitioner's] business operations, those of Alafabco, and the course of dealings of the parties . . . [did not justify compelling arbitration and] indeed, these factors are largely irrelevant to an FAA interstate commerce analysis." (Pet., App. A at A10). The Alabama Supreme Court held that "*on its face*, the FAA applies only to transactions, contracts and controversies" and asserted that "The FAA focuses on the narrow concepts of acts, omissions, or agreements, not on the broader concepts on which the bank focuses, such as the nature of the parties' businesses [categories (1) and (2)] or the general 'course of dealings

between the parties.' [category (3)]." Therefore, the Alabama Supreme Court rejected the arguments urged by Petitioner in categories 1-3. (Pet., App. A at A10-A11).

Turning its attention to category 4 (communication media utilized by the parties to the transaction) and category 5 [(ederal regulatory existence), the Alabama Supreme Court rejected Petitioner's attempt to interpret the Federal Arbitration Act so broadly as to characterize these local commercial transactions as "interstate" in nature merely because a standardless analysis of the parties to these transactions revealed exposure to activity "involv[ing] interstate commerce" common to any commercial activity.

Specifically, the Alabama Supreme Court rejected the dubious contention "that involvement of the various forms of communication . . . such as the United States Postal Service and other methods of communication, as well as the existence of federal regulations governing loan transactions and deposits in general" provides sufficient nexi to interstate commerce to compel arbitration under the Federal Arbitration Act. (Pet., App. A at A12).

The Alabama Supreme Court, recognizing the inherent peril in such an expansively overreaching analysis of interstate commerce and the inevitable threat it would pose to the State's ability to exercise any degree of authority over commercial transactions within its borders by legislation, concluded the following:

> The interstate communications services and sundry federal regulations on which the bank seeks to rely touch this transaction so remotely and tangentially as to warrant no consideration. *Holding that a transaction is subject to the FAA*

> *simply by virtue of the ordinary use of interstate communication media in its furtherance, or by Congressional regulation of some aspect of one party's business, would effectively transform every "local" transaction into a "national" one. As Sisters of the Visitation points out, such an approach is impermissible under our federal system of government.* 775 So.2d at 767 *(citing NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). [emphasis added]. (Pet., App. A at A13).

Finally, the Alabama Supreme Court considered the contention of Petitioner in what the court classified as category six ["the nature of the specific transaction at issue"]. The court concluded that if "part of the money specifically involved in the *debt restructuring* was used to finance operations in North Carolina and Tennessee [by Alafabco], then this would involve a valid consideration, and if supported by the record, could afford a basis for arbitrability." (Pet., App. A at A13).

The court then discussed the invoices purporting to evidence the out-of-state work and concluded that "those projects all occurred in 1995, *three years before* the occurrence of any of the events made the basis of Alafabco's complaint or of the alleged defaults that precipitated the debt restructuring. . . . Thus, for all that appears, these transactions had noting to do with this controversy . . . [and therefore] [o]n the state of the record . . . the 1995 projects [were] wholly 'separable' from the subject transaction [and thus failed the fifth prong of the "substantial effect" test established in *Sisters of the Visitation* and noted previously]." (Pet., App. A at A15).

SUMMARY OF ARGUMENT

This petition arose from an attempt by Citizens Bank to compel arbitration of a dispute concerning a series of commercial loan transactions between Citizens Bank and Alafabco, Inc. and the subsequent rejection by the Supreme Court of Alabama of that attempt to arbitrate. Essentially, this case involves the Alabama Supreme Court's interpretation of this Court's decisions in *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265 (1995) and *U.S. v. Lopez*, 514 U.S. 549 (1995) as applied to Section 2 of the Federal Arbitration Act (9 U.S.C. § 2) and the requirement imposed by the Alabama Supreme Court that a commercial transaction must "substantially affect" interstate commerce in order to be subject to arbitration under the Federal Arbitration Act. The primary thrust of Petitioner's argument is that "The Alabama Supreme Court improperly reads *Lopez* as requiring that a commercial transaction must not only 'involve' or 'affect' interstate commerce under Section 2 of the FAA, (as set forth in *Allied-Bruce*), but must 'substantially affect' interstate commerce." (Pet. at 13). Petitioner argues that in order to give effect to this "substantial effect" test, "the Alabama Supreme Court's decision would require one to ignore *Allied-Bruce* in favor of dicta in *Lopez*." (Pet. at 15). This argument is disingenuous in the extreme, in that it fails to concede that the Alabama Supreme Court was simply attempting to give effect to both of these important decisions governing the scope of federal authority by reconciling them into a cogent and reliable test. Petitioner ostensibly argues that "the lower court has taken *Lopez*, a case that did not involve commerce or economic activity whatsoever and has superimposed its 'substantiality' language upon every FAA analysis. . . ." (Pet. at 18).

Petitioner actually seeks to exploit a standardless analysis *designed* to reveal exposure to activity "involv[ing] interstate commerce" common to any commercial activity in an effort to force a local commercial transaction within the parameters of "interstate commerce." Petitioner urges this analysis by citing such remote exposure to interstate commerce as the medium of exchange (checks), and the use of the mail and telephones. (Pet. at 7). These practices are necessarily engaged in during the course of most local transactions. This strained analysis was rejected by the Supreme Court of Alabama in its thorough and meticulous examination of the five-pronged test set forth in *Sisters of the Visitation,*775 So.2d 759 (Ala. 2000).

REASONS FOR DENYING THE PETITION

I

THE ALABAMA SUPREME COURT'S RULING DOES NOT CONFLICT WITH *ALLIED-BRUCE TERMINIX COMPANIES V. DOBSON.*

Petitioner argues that "The Supreme Court of Alabama has decided an important issue concerning the phrase 'involving commerce' in Section 2 of the FAA in a manner that runs contrary to language of Section 2 and the established purpose of the Act." (Pet. at 10). Petitioner correctly points out that this Court, in *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265, 273-274 (1995), stated ". . . we conclude that the word 'involving' is broad and is indeed the functional equivalent of 'affecting'." Indeed, this Court stated, at page 275, that ". . . a broad interpretation of this language is consistent with the Act's basic purpose . . ."

Petitioner, however, minimizes other significant language in the opinion and factual background of *Allied-Bruce* which is inconvenient to Petitioner's analysis. One of this Court's primary rulings in the *Allied-Bruce* case was the standard of analysis used to evaluate whether a commercial transaction was subject to the Federal Arbitration Act. This Court concluded that a transaction must involve interstate commerce *in fact* to be enforceable under the Federal Arbitration Act and specifically rejected a "contemplation of the parties" standard. *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265, 278 (1995). Based on the *Allied-Bruce* analysis, a party seeking to compel arbitration (Citizens Bank in the instant case) may fail if the transaction itself cannot be shown to involve interstate commerce. That is precisely what the Alabama Supreme Court found that the Petitioner had failed to show.

Furthermore, Petitioner ignores the factual background of the dispute in the *Allied-Bruce* case. In *Allied-Bruce*, this Court specifically stated, at 282, that:

> The parties do not contest that the *transaction* [emphasis added] in this case . . . involved interstate commerce. In addition to the multistate nature of Terminix and Allied Bruce, the termite-treating and house repairing material used by Allied Bruce in its (allegedly inadequate) efforts to carry out the terms of the Plan, came from outside Alabama.

In other words, the parties in *Allied-Bruce* did not contest the fact that the transaction involved interstate commerce, whereas, in the case at bar, the Respondents consistently maintained that the transactions with the

Petitioner did not "involve" interstate commerce in a manner to invoke the Federal Arbitration Act.

II

THE "SUBSTANTIAL EFFECT" TEST EMPLOYED BY THE ALABAMA SUPREME COURT IS CONSISTENT WITH THIS COURT'S DECISION IN *U.S. V. LOPEZ.*

Petitioner contends that the Alabama Supreme Court incorrectly adopted the "substantial effect" test for interstate commerce as outlined in *U.S. v. Lopez*, 514 U.S. 549 (1995) in its analysis of cases involving the Federal Arbitration Act. Petitioner argues that "This Court did not mention *Allied-Bruce* when it stated in *Lopez* that an activity must 'substantially affect interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause.' *Lopez*, 514 U.S. at 559." (Pet. at 15). That this Court did not specifically cite *Allied-Bruce* in deciding *Lopez* does not support Petitioner's inference that *Lopez* had no effect on the interstate commerce analysis to be employed under *Allied-Bruce*.

Petitioner argues that "*Lopez* involved no economic activity. This Court determined the criminal statute was beyond Congress' power to enact because the statute 'neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce.' *Lopez* 514 U.S. at 551. *Lopez* covered purely intrastate acts, and the issue was not what quantum of evidence would satisfy an interstate commerce jurisdiction prerequisite. Rather, the issue was whether Congress had authority to pass the law." (Pet. at 14).

This analysis of *Lopez* completely fails to address this Court's rejection of the precise brand of overreaching in which Petitioner is engaged in the instant case. While this Court in *Lopez* did hold that the legislation at issue did not involve interstate commerce, it did so only after a scathing rejection of a wildly expansive interpretation of interstate commerce such as is urged by the Petitioner in the instant case. In fact, this Court left little doubt that such an expansive interpretation of the Commerce Clause was wholly inappropriate. Consider this Court's contemplation of the interstate commerce nexus urged by the federal government in *Lopez* and the resoundingly flat rejection with which this argument was met by this Court, fearing an unwarranted federal intrusion into the province of State law:

> The Government's essential contention . . . is that we may determine here that § 922 (q) is valid because possession of a firearm in a local school does indeed substantially affect interstate commerce. Brief for United States 17. The government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are . . . spread throughout the population . . . Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe [internal citation omitted]. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse impact on

> the Nation's economic wellbeing. As a result, the Government argues that Congress could have rationally concluded that § 922(q) substantially affects interstate commerce.

U.S. v. Lopez, 514 U.S. 549 (1995) at 563-564. Essentially, this is an analogous evaluation of "interstate commerce" to that advocated by Petitioner through such remote exposure as the United States Postal Service, checks as a medium of exchange in commerce and the simple use of the telephone, all of which, according to Petitioner, justify forcing a local commercial transaction within the parameters of national "interstate commerce."

This Court bluntly and forcefully rejected such a strained interpretation of "interstate commerce," as propounded by Petitioner, by evaluating the consequences of such a perception of interstate commerce. This Court's distaste for such a wildly expansive view of the commerce clause power is evident in *U.S. v. Lopez*, 514 U.S. 549, 563-564 (1995) wherein the Court stated:

> We pause to consider the implication of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, *regardless of how tenuously they relate to interstate commerce.* [emphasis added] *See* Tr. Of Oral Arg. 8-9. Similarly, under the Government's national productivity reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the government presents in support of § 922(q), *it is difficult to perceive any limitation on federal power*

> [emphasis added], even in areas such as criminal law enforcement or education where States historically have been sovereign. *Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.* [emphasis added].

The concerns expressed by this Court in *Lopez* illustrated the peril of what Petitioner urges is the correct interpretation of Section 2 of the Federal Arbitration Act. In Petitioner's view, the "broad" interpretation of "affecting interstate commerce" in *Allied-Bruce* not only justifies, but *requires* an interpretation of the Federal Arbitration Act so *expansively broad* as to characterize a local commercial transaction alleged to come within its purview as "interstate" in nature merely because a strained analysis of the transaction, and the parties thereto, reveals exposure to some activity "involving interstate commerce" which is common to any commercial activity.

III

THE ALABAMA SUPREME COURT'S "INTERSTATE COMMERCE" TEST IN *SISTERS OF THE VISITATION V. COCHRAN PLASTERING COMPANY* CORRECTLY INTEGRATES THIS COURT'S DECISIONS IN *ALLIED-BRUCE TERMINIX COMPANIES V. DOBSON* AND *U.S. V. LOPEZ* AND WAS PROPERLY APPLIED IN THE CASE BELOW.

In *Sisters of the Visitation v. Cochran Plastering Company*, 775 So.2d 759 (Ala. 2000), the Alabama Supreme Court reconciled this Court's rulings in *Allied-Bruce* and *Lopez*. The *Sisters of the Visitation* opinion discussed this Court's decision in *Wickard v. Filburn*, 317 U.S. 111

(1942), a case which Petitioner cites as authority because "this Court held that Congress could, consistent with the Commerce Clause, regulate wheat produced by a farmer for personal consumption on his own farm . . . and Congress could regulate the activity consistent with the Commerce Clause . . . [and] . . . [t]his Court thus upheld the aggregation approach to testing the effect of a commercial activity upon interstate commerce, as opposed to testing the isolated activity in a vacuum." (Pet. at 15-16).

The Alabama Supreme Court, in considering the *Wickard* decision, concluded that "unless *Wickard* is overruled or read very narrowly, very little that occurs in this country can be viewed as not having some involvement with interstate commerce." *Sisters of the Visitation v. Cochran Plastering Company*, 775 So.2d 759, 761 (Ala. 2000). In *Sisters of the Visitation*, the Alabama Supreme Court considered and rejected an unduly expansive interpretation of *Wickard's* Commerce Clause analysis, stating that:

> One cannot seriously argue that unless all transactions, some of which by themselves might have only a local influence or at most an indirect connection to interstate commerce, come within the scope of the FAA, that act will become some sort of scarecrow, lacking substance and a field of operation, so that Congress's primary purpose will be defeated. Such an expansive application of the FAA would tend to defeat the doctrine of federalism, making that doctrine a hollow shell. To recognize such a wide sweep of federal authority would stifle the State's interest in, or efforts toward, developing creative solutions to other common problems.

Sisters of the Visitation v. Cochran Plastering Company, 775 So.2d 759, 764 (Ala. 2000).

The Alabama Supreme Court concluded that an overly expansive interpretation of *Wickard* was impermissible and sought to give effect to both *Allied-Bruce* and *Lopez*, stating that:

> The [United States Supreme] Court in *Lopez*, after reviewing *Wickard*, acknowledged that it was inappropriate to make an excessively elastic application of the Commerce Clause. It stated that for an economic activity to come within Congress's authority under the Commerce Clause the activity must substantially affect interstate commerce.

The Alabama Supreme Court then embraced the reasoning of the *Lopez* Court and supported its decision by explaining that:

> The *Lopez* Court referred to the requirement of a substantial effect as generally applicable to regulation of economic activity [internal citations omitted]. That broad reference, albeit dictum, does not suggest that the requirement of a substantial effect would not apply to the question whether a particular contract is subject to the FAA.

Sisters of the Visitation v. Cochran Plastering Company, 775 So.2d 759, 761 (Ala. 2000).

Because this interpretation does not impose an interpretation of the Federal Arbitration Act so expansively broad as to characterize a local commercial transaction alleged to come within its purview as "interstate" in nature merely because a *standardless* analysis of the

transaction and parties thereto reveals exposure to activity "involv[ing] interstate commerce" common to any commercial activity, Petitioner resorts to the hyperbolic argument that ". . . to give effect to the Alabama Supreme Court's decision would require one to ignore *Allied-Bruce* in favor of dicta in *Lopez*." (Pet. at 15).

Contrary to Petitioner's assertion, the Alabama Supreme Court, in *Sisters of the Visitation, supra,* at 764-766, gave effect both to *Allied-Bruce* and to *Lopez* by imposing a test for a "substantial effect" on interstate commerce which maintained a broad interpretation of "affecting commerce" by imposing a five pronged test which examines:

I. Citizenship of the Parties.
II. Tools and Equipment.
III. Allocation of Cost of Services and Materials.
IV. Subsequent Movement Across State Lines.
V. Degree of Separability From other Contracts.

The Alabama Supreme Court, after thoroughly examining each of the five prongs established in *Sisters of the Visitation,* concluded that the transactions involved in the case at bar could not support arbitrability of the dispute.

CONCLUSION

For these reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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(3)

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IN THE

Supreme Court of the United States

THE CITIZENS BANK,
Petitioner,

v.

ALAFABCO, INC., DONNIE COTTINGHAM, JOANN BECK, AND WESTON BECK,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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BRIEF FOR ALABAMA BANKERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court has *sub silentio* overruled the long-standing requirement under the *Wickard v. Filburn* line of cases, under which intrastate commercial transactions must be aggregated to determine if they have a substantial effect on interstate commerce, such that Congress cannot regulate under the Federal Arbitration Act an intrastate commercial loan agreement between a federally regulated bank and a construction company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	4
I. CERTIORARI IS WARRANTED TO RESOLVE THE CONFLICT CREATED BY THE ALABAMA SUPREME COURT'S DECISION THAT *LOPEZ* OVERRULED LONGSTANDING DECISIONS OF THIS COURT FOR DETERMINING WHEN INTRASTATE COMMERCIAL TRANSACTIONS SUBSTANTIALLY AFFECT INTERSTATE COMMERCE	4
A. The Alabama Supreme Court Held that *Lopez* Revived an Abandoned New Deal Era Test for Determining Whether Commercial Transactions Substantially Affect Interstate Commerce	4
B. The Alabama Supreme Court's Decision Directly Conflicts with this Court's Decisions in *Allied-Bruce*, *Wickard*, *Lopez*, and *Morrison*	6
II. CERTIORARI IS WARRANTED TO RESOLVE THE CONFLICT BETWEEN THE ALABAMA SUPREME COURT'S AND THE MONTANA SUPREME COURT'S DECISIONS ABANDONING THE *WICKARD-LOPEZ* AGGREGATION RULE AND THE TEXAS SUPREME COURT'S AND THE ELEVENTH CIRCUIT'S DECISIONS ADHERING TO THAT RULE	11

TABLE OF CONTENTS—Continued

	Page
III. CERTIORARI IS WARRANTED ON THIS IMPORTANT QUESTION OF FEDERAL LAW TO QUASH THE GROWING BODY OF CASE LAW THAT IS CARVING OUT SUBSTANTIAL CLASSES OF COMMERCIAL TRANSACTIONS FROM THE REACH OF THE FEDERAL ARBITRATION ACT	13
A. The Alabama Supreme Court Continues Its History of Anti-FAA Rulings	13
B. The Alabama Supreme Court is Expanding the Categories of Commercial Transactions No Longer Subject to Congressional Regulation Under the FAA	15
CONCLUSION	18

TABLE OF AUTHORITIES

CASES	Page
A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935)	7
Alafabco v. Citizens Bank, No. 1010703, 2002 WL 1998268 (Ala. Aug. 30, 2002)	*passim*
Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995)	*passim*
Allied-Bruce Terminix Cos. v. Dobson, 628 So. 2d 354 (Ala. 1993)	14
Alternative Fin. Solutions, LLC v. Colburn, 821 So. 2d 981 (Ala. 2001)	16
Aronov Realty Brokerage, Inc. v. Morris, No. 1001292, 2002 WL 734345 (Ala. April 26, 2002)	15
Bowen v. Security Pest Control, Inc., No. 1010783, 2003 WL 604037 (Ala. Feb. 28, 2003)	16
Brookfield Constr. Co. v. Van Wezel, No. 1010353, 2002 WL 1397986 (Ala. June 28, 2002)	15
Carter v. Carter Coal Co., 298 U.S. 238 (1936)	7, 15
Chao v. Mallard Bay Drilling, Inc., 534 U.S. 235 (2002)	16
Circuit City v. Adams, 532 U.S. 105 (2001)	17
City of Cut Bank v. Tom Patrick Construction Co., 963 P.2d 1283 (Mont. 1998)	11, 12
Ex parte Alabama Oxygen, 433 So. 2d 1158 (Ala. 1983)	13, 14
Ex parte Kampis, 826 So. 2d 819 (Ala. 2002)	15
Ex parte Learakos, 826 So. 2d 782 (Ala. 2001)	15
Ex parte Webb, No. 1000651, 2003 WL 378356 (Ala. Feb. 21, 2003)	17
Ford Motor Credit Co. v. Cenance, 452 U.S. 155 (1981)	16

TABLE OF AUTHORITIES—Continued

	Page
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)	9
Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981)	9
Hudson v. United States, 522 U.S. 93 (1997)	16
In re L&L Kempwood Associates, L.P., 9 S.W.3d 125 (Tex. 1999)	12
Katzenbach v. McClung, 379 U.S. 294 (1964)	8, 9, 18
Liberty National Life Ins. Co. v. Douglas, 826 So. 2d 806 (Ala. 2002)	16
Marina Cove Condominium Owners Ass'n v. Isabella Estates, 34 P.3d 870 (Wash. App. 2001)	12
Maryland v. Wirtz, 392 U.S. 183 (1968)	8
McConnell Auto. Corp. v. Jackson, No. 1010006, 2002 WL 31439766 (Ala. Nov. 1, 2002)	16
Meyer v. Holley, 123 S. Ct. 824 (2003)	16
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)	8
Perez v. United States, 402 U.S. 146 (1971)	*passim*
Reno v. Condon, 528 U.S. 141 (2000)	16
Sisters of the Visitation v. Cochran Plastering Co., 775 So. 2d 759 (Ala. 2000)	5, 14, 15
Southland Corporation v. Keating, 465 U.S. 1 (1984)	14
United States v. Gray, 260 F.3d 1267 (11th Cir. 2001)	12, 13
United States v. Lopez, 514 U.S. 549 (1995)	*passim*
United States v. Morrison, 529 U.S. 598 (2000)	*passim*
United States v. Peterson, 236 F.3d 848 (7th Cir. 2001)	13
Wickard v. Filburn, 317 U.S. 111 (1942)	*passim*

TABLE OF AUTHORITIES—Continued

	Page
Wien & Malkin, LLP v. Helmsley Spear, Inc., 751 N.Y.S. 2d 21 (N.Y. App. Div. 2002)	12
York Int'l v. Alabama Oxygen, Inc., 465 U.S. 1016 (1984)	14
STATUTES AND RULES	
Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-2725	16
Fair Housing Act, 42 U.S.C. § 3601	16
Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*	*passim*
Federal Reserve Deposit Insurance Act, 12 U.S.C. § 1818	16
Occupational Safety and Health Act, 29 U.S.C. § 651	16
Truth in Lending Act, 15 U.S.C. § 1601	16
Supreme Court Rule 37	1
OTHER AUTHORITIES	
Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess. (1924)	7
Lea Richmond IV, Comment, *Sisters of the Visitation v. Cochran Plastering Co.: Earnest Federalism or Reconstructive Defiance to the Federal Arbitration Act*, 25 Am. J. Trial Advoc. 633 (2002)	15

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

The Alabama Bankers Association ("ABA") is the principal trade association of the banking industry in the State of Alabama. It has members that conduct banking operations in small communities, throughout the State of Alabama, and regionally in numerous States. Birmingham, Alabama is the fourth largest banking city in the nation in terms of bank assets headquartered in the city.

The ABA frequently appears in litigation as *amicus curiae* where the issues raised are of widespread importance and concern to banks, consumers of banking services, and the business community in general. Many ABA members regularly include arbitration agreements in their loan documents and deposit and business contracts.

Pursuant to Supreme Court Rule 37.2(a), the ABA has conferred with the parties regarding the filing of this brief *amicus curiae*, and both parties have consented to its filing. Evidence of the written consent of the parties has been filed separately herewith.

The ABA respectfully submits this brief in support of the petition for writ of certiorari filed by Petitioner, The Citizens Bank.

SUMMARY OF THE ARGUMENT

This Court should grant the petition for writ of certiorari to resolve the conflict between the decision of the Alabama Supreme Court, refusing to apply the clear and long-standing aggregation test for determining whether a commercial transaction substantially affects interstate commerce and is

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that this brief was prepared in its entirety by *amicus curiae* and its counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amicus curiae*, its members, and its counsel. Petitioner, The Citizens Bank, is a member of the *amicus curiae*.

subject to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, *et seq.*, and the decisions of this Court, another state court of last resort, and the courts of appeal. Moreover, this Court should grant the petition for writ of certiorari to quash a rapidly expanding body of Alabama case law that rejects Congress' power to regulate our national economy via the FAA.

While acknowledging that *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), held that the FAA applies to the *full extent* of the Commerce Clause, the Alabama Supreme Court nonetheless has issued a line of decisions limiting the Commerce Clause's reach in arbitration cases. The Alabama court has premised these decisions on the erroneous conclusion that *United States v. Lopez*, 514 U.S. 549 (1995), overruled this Court's long-standing Commerce Clause test announced in *Wickard v. Filburn*, 317 U.S. 111 (1942). *Wickard* established that a purely intrastate economic activity (*i.e.*, the production of wheat on a farm for personal consumption) is subject to Congress' commerce power if that activity, when aggregated with similarly situated activities throughout the nation, substantially affects interstate commerce. Applying long-abandoned New Deal-era Commerce Clause rationale, the Alabama Supreme Court concluded that *Lopez* eliminated the requirement to apply the *Wickard* aggregation test and, thus, the FAA to contracts evidencing intrastate economic activities.

Contrary to the Alabama Supreme Court's holding, however, *Lopez*, 514 U.S. at 561, limited the *Wickard* aggregation test only with respect to *non*economic activities. While the *Lopez* Court held that a *non*economic activity (*i.e.*, possession of a firearm) was not subject to the Commerce Clause, it expressly recognized the continuing application of the Commerce Clause to intrastate *economic* activities "which viewed *in the aggregate*, substantially affect[] interstate commerce." *Id.* (emphasis added).

For economic activities, *Lopez*, 514 U.S. at 559-60, and *United States v. Morrison*, 529 U.S. 598, 610 (2000), confirmed that aggregation remains the rule, citing numerous aggregation precedents with approval, including *Wickard* and *Perez v. United States*, 402 U.S. 146 (1971). In *Perez*, *id.* at 154, this Court held that two "*purely intrastate*" loans of money by an individual "loan shark" to a business fell within Congress' commerce power because the "class of activities regulated" (*i.e.*, similarly situated loan transactions in the aggregate) sufficiently affected interstate commerce. (Emphasis added). The facts of this case (*i.e.*, commercial bank loans) are much stronger than those in *Perez*.

The Texas Supreme Court and the Eleventh Circuit have recognized the continuing efficacy of the *Wickard-Lopez* aggregation test. The Supreme Courts of Alabama and Montana have reached the opposite conclusion.

Indeed, the Alabama Supreme Court's holding in this case is a continuation of that court's repeated history of anti-FAA rulings and is part of a rapidly expanding body of Alabama case law that rejects Congress' power to regulate, through the FAA, numerous types of intrastate commercial transactions. This underscores the need to grant the petition for writ of certiorari in order to resolve the conflicts and reestablish a uniform application of the FAA among the States.

ARGUMENT

I. CERTIORARI IS WARRANTED TO RESOLVE THE CONFLICT CREATED BY THE ALABAMA SUPREME COURT'S DECISION THAT *LOPEZ* OVERRULED LONGSTANDING DECISIONS OF THIS COURT FOR DETERMINING WHEN INTRASTATE COMMERCIAL TRANSACTIONS SUBSTANTIALLY AFFECT INTERSTATE COMMERCE.

A. The Alabama Supreme Court Held that *Lopez* Revived an Abandoned New Deal-Era Test for Determining Whether Commercial Transactions Substantially Affect Interstate Commerce.

In *Alafabco v. Citizens Bank*, No. 1010703, 2002 WL 1998268 (Ala. Aug. 30, 2002), the Alabama Supreme Court refused to apply the FAA to two commercial loan restructuring contracts entered into by Citizens Bank and Alafabco, a construction company. The Alabama Supreme Court applied a long-abandoned, New Deal-era test under which the loan transactions at issue and the incidental interstate activities of the parties[2] were not aggregated with other similarly situated commercial loan activities and thus had only an indirect effect on interstate commerce. *Id.* at *4.

[2] The Alabama court concluded that "the facts that the Bank 'routinely conducts business in interstate commerce'; that Alafabco owns and uses materials 'manufactured outside the state of Alabama'; and that Alafabco operates its business with funds borrowed from the Bank cannot support arbitrability of this dispute." *Alafabco*, at *5. The Alabama Court viewed the loan transactions themselves as intrastate activities. *Id.* at *7. Although ABA disagrees with this characterization, under this Court's aggregation requirement, the intrastate characterization is not constitutionally determinative. *See Wickard*, 317 U.S. at 127-28.

In refusing to apply the aggregation test, the Alabama Supreme Court relied on its previous decision in *Sisters of the Visitation v. Cochran Plastering Co.*, 775 So. 2d 759 (Ala. 2000). In *Sisters of the Visitation*, the Alabama court concluded that *Lopez* restricted the application of *Wickard's* aggregation requirement, stating:

> [W]e conclude that the question whether the actions of an individual, which actions standing alone would be considered "local" actions or actions with only an "*indirect*" influence on interstate commerce, may be considered to have a substantial influence on interstate commerce is to be determined by considering *how critical the regulation of all similarly situated persons' activity is* to the accomplishment of the primary purpose of a statute drawn to regulate an activity clearly having a substantial effect on interstate commerce.

Id. at 764 (emphases added). The Alabama court concluded that the regulation of intrastate commercial activities is not "critical" to the FAA because excluding intrastate activities from the Act's reach still would afford the FAA a field of operation over interstate transactions. *Id.* at 764-65. Thus, the Alabama court used a Commerce Clause test resembling the New Deal-era "direct" versus "indirect" effects test, under which the court examined:

> (1) the 'citizenship of the parties,' (2) the origin of any 'tools and equipment' actually used in the transaction, (3) the 'allocation of cost of services and materials,' (4) the 'subsequent movement across state lines' of the 'object of the services,' and (5) the 'degree of separability from other contracts.'

Alafabco, at *4 (quoting *Sisters of the Visitation*, 775 So. 2d at 765-67).

Employing this non-aggregation test to Citizen Bank's commercial loan restructuring agreements, the Alabama Supreme Court held that the FAA was not applicable because:

> [T]he parties in this case are Alabama residents. The Bank did not show that any portion of the restructured debt was actually attributable to interstate transactions; that the funds comprising that debt originated out-of-state; or that the restructured debt was inseparable from any out-of-state projects. Consequently, the Bank failed to carry its burden of proof on the interstate-commerce issue.

Id. at *8. The Alabama court rejected as irrelevant Citizens Bank's argument that the loan transactions arose out of or were connected with the parties' general interstate business dealings. *Id.* at *5. Because the Alabama court concluded that the specific commercial loan restructuring transactions themselves did not directly involve the interstate transfer of funds or the funding of a project to be completed out-of-state, but had only an indirect effect on interstate commerce, it held that the FAA was inapplicable. *Id.* at *8.

As pointed out by Justice See in his dissent, had the Alabama Supreme Court applied the *Wickard-Lopez* aggregation test, it would have had to hold that the FAA applied to the underlying commercial loans because those loans, when aggregated with all similarly situated commercial loans, substantially affected interstate commerce. *See Alafabco, id.* at *8 (*See*, J., dissenting).

B. The Alabama Supreme Court's Decision Directly Conflicts with this Court's Decisions in *Allied-Bruce*, *Wickard*, *Lopez*, and *Morrison*

Contrary to the Alabama Supreme Court's conclusion that application of the FAA to intrastate transactions is not "critical" to that Act's purpose, this Court in *Allied-Bruce*, 513 U.S. at 279, stated that "[t]he Act's history ... indicates

that the Act's supporters saw the Act as part of an effort to make arbitration agreements *universally enforceable*." (Citing *Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary*, 68th Cong., 1st Sess., at 16 (1924)) (emphasis added).

The FAA provides in pertinent part that a "written provision in . . . a contract evidencing a transaction *involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable . . . ." 9 U.S.C. § 2 (emphasis added). In *Allied-Bruce*, 513 U.S. at 277, this Court concluded that the FAA's use of "the word 'involving,' like 'affecting,' signals an intent to exercise Congress' commerce power *to the full*." (Emphasis added.) Since 1937, Congress' commerce power has reached economic activities with minor interstate connections and economic activities that are purely intrastate.

Prior to 1937, during the New Deal-era, the Court restricted the reach of Congress' commerce power to intrastate economic activities by using rigid formalistic tests (*e.g.*, the "direct" versus "indirect" effects test) that invalidated a plethora of federal commercial legislation. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 307-10 (1936) (striking down portions of Bituminous Coal Conservation Act).[3] The Supreme Court eventually abandoned the "direct" versus "indirect" effects test and the other formalistic tests for determining whether an intrastate activity was subject to

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[3] *See, e.g., A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 548 (1935) (striking down a wage and hour provision of the National Industrial Recovery Act that had "no direct relation to interstate commerce").

federal regulation under the Commerce Clause. *See, e.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).[4]

In *Wickard*, 317 U.S. at 125, the Court held that a farmer's growing of wheat for personal consumption was within Congress' commerce power. The Court explained that an aggregation test must be used, stating:

> [E]ven if [the farmer's] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."
>
> . . . .
>
> That [the farmer's] own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.

Id. at 125, 127-28.

In *Perez*, 402 U.S. 146, this Court upheld congressional regulation of loan sharking. In applying the *Wickard* aggregation test to "purely intrastate" loans from an individual to the operator of a butcher shop, the Court emphasized that the Commerce Clause focuses on the "class of activities regulated" and the "'total incidence' of the practice on commerce." *Id.* at 154 (quoting *Katzenbach v. McClung*, 379 U.S. 294, 301 (1964)). *See generally Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968) ("[W]here a general regulatory statute bears a substantial relation to commerce,

[4] In *Jones & Laughlin Steel Corp.*, 301 U.S. 1, the Supreme Court upheld a federal statute guaranteeing collective bargaining for employees engaged in the manufacture of goods to be shipped in interstate commerce.

the *de minimis* character of individual instances arising under that statute is of no consequence.").

If Congress' commerce power extends to the loans made by an individual to the operator of a butcher shop in *Perez*, it also extends to loans made by the federally regulated bank to the construction business in this case.

Despite the Alabama Supreme Court's holding to the contrary, *Lopez* restricted application of the aggregation test only to *non*economic activities, and not to economic activities, like loans. In *Lopez*, 514 U.S. at 558-59, this Court summarized its post-*Wickard* Commerce Clause jurisprudence, stating:

> First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce. . . .

(Citations omitted.) The *Lopez* Court further recounted:

> [W]e have upheld a wide variety of congressional Acts regulating intrastate *economic* activity where we have concluded that the activity substantially affected interstate commerce. Examples include the regulation of intrastate coal mining; *Hodel* [*v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981)], *intrastate* extortionate *credit transactions*, *Perez*, *supra*, restaurants utilizing substantial interstate supplies, *McClung*, *supra*, inns and hotels catering to interstate guests, *Heart of Atlanta Motel*, [*Inc. v. United States*, 379 U.S. 241 (1964)], and production and consumption of homegrown wheat, *Wickard v. Filburn*. . . . These examples are by no means exhaustive, but the

> pattern is clear. Where *economic* activity substantially affects interstate commerce, legislation regulating that activity will be sustained.

Id., 514 U.S. at 559-60 (emphases added).

To remove any doubt as to the continuing efficacy of the aggregation test to economic activities, the *Lopez* Court stated that, unlike the commercial regulatory statutes listed above, a statute criminalizing the mere possession of an inanimate object, a firearm:

> cannot . . . be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed *in the aggregate*, substantially affects interstate commerce.

Id., 514 U.S. at 561 (emphasis added).

Despite the Alabama Supreme Court's holding that *Lopez* had limited the application of *Wickard* even for economic activities, this Court in *Morrison*, 529 U.S at 610, 617, reconfirmed the application of the aggregation principle of *Wickard* for economic activities. While this Court "reject[ed] the argument that Congress may regulate *non*economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce," this Court again expressly approved *Perez*, which aggregated economic activities—loans. *Id.* at 610, 617 (emphasis added.). Moreover, this Court reiterated that it has consistently "sustained federal regulation under the *aggregation principle* in *Wickard* . . . [where] the regulated activity was of an apparent commercial character." *Id.* at 611 n.4 (emphasis added).

Bank loans have a "commercial character." Bank loans are economic activities. Indeed, it is difficult to posit a more "commercial" or "economic" activity than a commercial bank loan. Federal regulation of bank loans promotes stability in our national economy.

The aggregation principle that was established in *Wickard*, applied specifically to the loans of money in *Perez*, confirmed in *Lopez*, and reconfirmed in *Morrison*, applies to the commercial loans made by Citizens Bank to Alafabco in this case. When the commercial loan restructuring transactions between Citizens Bank and Alafabco are aggregated with similarly-situated commercial loans throughout the country, they "substantially affect interstate commerce." The Alabama Supreme Court's holding to the contrary conflicts with more than half a century of this Court's Commerce Clause precedents and with *Allied-Bruce,* 513 U.S. at 277, which expressly held that the FAA "exercise[s] Congress' commerce power *to the full*." (Emphasis added.)

II. CERTIORARI IS WARRANTED TO RESOLVE THE CONFLICT BETWEEN THE ALABAMA SUPREME COURT'S AND THE MONTANA SUPREME COURT'S DECISIONS ABANDONING THE *WICKARD-LOPEZ* AGGREGATION RULE AND THE TEXAS SUPREME COURT'S AND THE ELEVENTH CIRCUIT'S DECISIONS ADHERING TO THAT RULE.

In addition to conflicting with the FAA and Commerce Clause decisions of this Court, the Alabama Supreme Court's holding in this case mirrors an incorrect decision of the Montana Supreme Court and conflicts with decisions by the Texas Supreme Court and the Eleventh Circuit that follow this Court's precedents.

In *City of Cut Bank v. Tom Patrick Construction Co.*, 963 P.2d 1283, 1286 (Mont. 1998), the Montana Supreme Court, like the Alabama Supreme Court, incorrectly concluded that this Court's holding in *Lopez*—that an activity must "*substantially* affect interstate commerce"—modified *Allied-Bruce* and thus the reach of the FAA. Instead of applying the *Wickard-Lopez* aggregation test, the Montana court held that

a largely intrastate construction contract was not subject to the FAA because it "was a local transaction, not involving interstate commerce . . . ." *Id.* at 1287.

The Alabama Supreme Court's decision in this case and the Montana Supreme Court's decision in *Tom Patrick Construction* directly conflict with the Texas Supreme Court's decision in *In re L&L Kempwood Associates, L.P.*, 9 S.W.3d 125 (Tex. 1999). In *Kempwood*, *id.* at 127, the Texas Supreme Court rejected the argument that *Lopez* restricted the reach of the Commerce Clause and the FAA with respect to economic activities, stating that "*Lopez*, decided April 26, 1995, did not cite *Allied-Bruce*, decided January 18, 1995, or suggest in any way that it had changed its view of Congress's commerce power over economic activities." [5] Thus, the Texas court correctly applied the FAA to a largely intrastate construction contract. *Id.*

Similarly, the Alabama Supreme Court's non-aggregation decision for commercial transactions conflicts with the Commerce Clause decisions of the United States Court of Appeals for the Eleventh Circuit. In *United States v. Gray*, 260 F.3d 1267 (11th Cir. 2001), the Eleventh Circuit rejected the argument that *Lopez* or *Morrison* restricted the reach of the Commerce Clause with respect to economic activities and upheld the application of the Hobbs Act to a robbery. The Eleventh Circuit explained that the statute "struck down in

[5] Since *Lopez*, other state courts also have refused to apply the FAA to intrastate commercial transactions. *See, e.g., Wien & Malkin, LLP v. Helmsley Spear, Inc.*, 751 N.Y.S.2d 21, 22 (N.Y. App. Div. 2002) (holding that because "the termination of defendant as managing agent at buildings located within the City of New York, does not have a substantial effect on interstate commerce, the Federal Arbitration Act does not apply") (citing *Lopez* and *Allied-Bruce*); *Marina Cove Condominium Owners Ass'n v. Isabella Estates*, 34 P.3d 870 (Wash. App. 2001) (holding that post-*Lopez*, the FAA did not apply to the intrastate sale of condominiums).

Lopez . . . attempted to regulate *non*-economic criminal conduct." *Gray*, 260 F.3d at 1273 (emphasis added). In contrast, the court of appeals recognized that "under the aggregation theory, economic activity that may not itself substantially affect interstate commerce may be regulated under the Commerce Clause if that conduct, in the aggregate, would have such a substantial effect." *Id.* n.2 (Citing *Wickard*, 317 U.S. at 127-28). *See, e.g., United States v. Peterson*, 236 F.3d 848, 852 (7th Cir. 2001) (holding that after *Lopez* and *Morrison*, aggregation is still appropriate for robberies that interfere with economic activity).

III. CERTIORARI IS WARRANTED ON THIS IMPORTANT QUESTION OF FEDERAL LAW TO QUASH THE GROWING BODY OF CASE LAW THAT IS CARVING OUT SUBSTANTIAL CLASSES OF COMMERCIAL TRANSACTIONS FROM THE REACH OF THE FEDERAL ARBITRATION ACT.

A. The Alabama Supreme Court Continues Its History of Anti-FAA Rulings.

The Alabama Supreme Court's rejection of this Court's FAA and Commerce Clause precedents in this case represents the continuation of the Alabama court's history of anti-FAA rulings. For example, in *Ex parte Alabama Oxygen*, 433 So. 2d 1158 (Ala. 1983), the Alabama court held that the FAA did not preempt state law that barred enforcement of pre-dispute arbitration agreements. The Alabama court noted Alabama's policy and statute barring enforcement of pre-dispute arbitration agreements and held that "[e]ven if Congress had the power to regulate under the Commerce Clause, such regulation would, under the circumstances here presented, constitute a violation of state rights pursuant to the Tenth Amendment." *Id.* at 1163. This Court vacated the Alabama Supreme Court's opinion and remanded in light of

Southland Corporation v. Keating, 465 U.S. 1 (1984). *See York Int'l v. Alabama Oxygen, Inc.*, 465 U.S. 1016 (1984). In *Southland*, 465 U.S. at 14, this Court held, contrary to the Alabama Supreme Court, that the FAA preempted state law and thus must be applied by state courts.

Next, in *Allied-Bruce Terminix Cos. v. Dobson*, 628 So. 2d 354 (Ala. 1993), the Alabama Supreme Court narrowly construed the language of the FAA to hold that the Act did not apply to a termite bond issued by a pest control company to a homeowner. The Alabama court's holding that the FAA was inapplicable to the termite bond contract was premised on its conclusion that the parties had not "contemplated substantial interstate activity when they entered the termite bond." *Id.* at 356. Recognizing the impact of such a narrow construction of the FAA on Congress' power to regulate commerce, this Court granted certiorari and reversed the Alabama court, holding that the FAA could not be restricted by the "contemplation of the parties" test. *Allied-Bruce*, 513 U.S. at 265. This Court explained that the "basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate." *Id.* at 270. This Court held that the FAA's scope encompasses the "exercise [of] Congress' commerce power to the full." *Id.* at 277.

While in *Alabama Oxygen* and *Allied-Bruce* the Alabama Supreme Court misconstrued states' rights theory, the 10th Amendment, and the language of the FAA to avoid the application of that Act to the full extent of the Commerce Clause, the Alabama court's current approach is to employ its own aggressive interpretation of federalism to misconstrue the Commerce Clause itself when applied to the FAA.

In *Sisters of the Visitation*, 775 So. 2d at 764, the Alabama Supreme Court stated:

> One cannot seriously argue that unless all transactions, some of which by themselves might have only a local influence or at most an *indirect connection* to interstate commerce, come within the scope of the FAA, that Act will become some sort of scarecrow, lacking substance and a field of operation, so that Congress's primary purpose will be defeated. Such an expansive application of the FAA would tend to defeat the *doctrine of federalism*, making that doctrine a hollow shell.

(Emphases added.) Thus, under its interpretation of federalism, the Alabama Supreme Court has, in effect, employed the New Deal-era "direct" versus "indirect" effects test to determine whether the FAA applies to any given contract. *See Carter Coal*, 298 U.S. at 307-10.[6]

Applying this erroneous test to this case, the Alabama Supreme Court disregarded the general interstate activities of Citizens Bank and Alafabco, refused to apply *Wickard-Lopez* aggregation to the intrastate loans, and held that the FAA was inapplicable to commercial loan restructuring contracts. *Alafabco*, at *8.

B. The Alabama Supreme Court is Expanding the Categories of Commercial Transactions No Longer Subject to Congressional Regulation Under the FAA.

Today in Alabama, state courts do not enforce the FAA in contracts evidencing the following types of intrastate economic activities: (1) remodeling of buildings, construction of houses, and purchases of condominiums, *Sisters of the Visitation*, 775 So. 2d 759; *Brookfield Constr. Co. v. Van Wezel*, No. 1010353, 2002 WL 1397986 (Ala. June 28, 2002); *Ex parte Learakos*, 826 So. 2d 782 (Ala. 2001), *Ex parte Kampis*, 826 So. 2d 819 (Ala. 2002), *Aronov Realty Brokerage, Inc. v. Morris*, No. 1001292, 2002 WL 734345

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[6] *See generally* Lea Richmond IV, Comment, *Sisters of the Visitation v. Cochran Plastering Co.: Earnest Federalism or Reconstructive Defiance to the Federal Arbitration Act*, 25 Am. J. Trial. Advoc. 633 (2002).

(Ala. April 26, 2002); [7] (2) retaliatory discharges of employees who file workers' compensation claims, *Liberty National Life Ins. Co. v. Douglas*, 826 So. 2d 806 (Ala. 2002);[8] (3) purchases of used cars, *McConnell Auto. Corp. v. Jackson*, No. 1010006, 2002 WL 31439766 (Ala. Nov. 1, 2002); [9] (4) making of consumer loans by finance companies, *Alternative Fin. Solutions, LLC v. Colburn*, 821 So. 2d 981 (Ala. 2001); [10] and (5) making of commercial loans by federally regulated banks, *Alafabco*, No. 1010703, 2002 WL 1998268.[11]

Indeed, even since its decision in *Alafabco*, the Alabama Supreme Court has decided two additional cases that reject this Court's FAA precedents. In *Bowen v. Security Pest Control, Inc.*, No. 1010783, 2003 WL 604037 (Ala. Feb. 28, 2003), the Alabama court effectively rejected this Court's ultimate holding in *Allied-Bruce* that the FAA applies to a termite contract performed in Alabama, concluding that post-*Lopez* the FAA does not apply to a termite contract performed

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[7] *But see generally, e.g., Meyer v. Holley*, 123 S. Ct. 824 (2003) (applying the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, which is premised upon Congress' commerce power, to the purchase of a house).

[8] *But see generally, e.g., Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235 (2002) (applying the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*, which is premised upon Congress' commerce power, to claims for injury arising out of the workplace).

[9] *But see generally, e.g., Reno v. Condon*, 528 U.S. 141 (2000) (applying the Driver's Privacy Protection Act, 18 U.S.C. §§ 2721—2725, which is premised upon Congress' commerce power, to the sale of information regarding the registration of automobiles).

[10] *But see generally, e.g., Ford Motor Credit Co. v. Cenance*, 452 U.S. 155 (1981) (applying the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, which is premised upon Congress' commerce power, to consumer loans).

[11] *But see generally, e.g., Hudson v. United States*, 522 U.S. 93 (1997) (applying Federal Reserve Deposit Insurance Act, 12 U.S.C. § 1818, which is premised upon Congress' commerce power, to officers of a bank that made commercial loans).

in Alabama. Because Bowen's termite treatment contract itself did not substantially affect interstate commerce, the Alabama court held that it fell outside Congress' commerce power. *Id.* at *2. The Alabama Court acknowledged that the pest control company generally purchased pesticide and tools from out of state, but concluded that because these items were not "purchased with [Bowen's] contract in mind," they were insufficient to invoke the FAA. *Id.* Justice See again dissented, stating that aggregation was required and that the direct versus indirect test had long been abandoned. *Id.* at *4, *5 (See, J., dissenting).

Further, in *Ex parte Webb*, No. 1000651, 2003 WL 378356 (Ala. Feb. 21, 2003), the Alabama Supreme Court effectively rejected this Court's decision in *Circuit City v. Adams*, 532 U.S. 105 (2001), applying the FAA to an intrastate employment contract, concluding that post-*Lopez* the FAA does not apply to an intrastate employment contract performed in Alabama. Because Webb's employment agreement did not itself substantially affect interstate commerce, the Alabama court concluded that the transaction was outside the scope of Congress' commerce power. *Id.* at *5. The Alabama Supreme Court acknowledged that the employer made general purchases of inventory and parts for resale "from out-of-state suppliers and vendors," but relied on *Alafabco* to conclude that they were insufficient to bring the transaction at issue within the scope of the Commerce Clause and, thus, the FAA. *Id.* (quoting *Alafabco*, at *5). However, as this Court recognized in a prior case:

> It goes without saying that, viewed in isolation, the volume of food purchased by Ollie's Barbecue from sources supplied from out of state was insignificant when compared with the total foodstuffs moving in

> commerce. But, as our late Brother Jackson said for the Court in *Wickard v. Filburn*, 317 U.S. 111 [, 127-28] (1942):
>
> > "That [the farmer's] own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."

McClung, 379 U.S. at 300-01.

CONCLUSION

This Court should grant the petition for writ of certiorari to resolve the conflict between the decision of the Alabama Supreme Court and decisions of this Court, and other state and federal courts, and to reestablish the uniform application of the FAA. Neither this Court's recent federalism jurisprudence in general, nor its economic-focused Commerce Clause jurisprudence in particular, prevents Congress from regulating a commercial bank loan. Unlike the Alabama Supreme Court, this Court has not revived a New Deal-era restrictive test to negate the FAA, which, like a plethora of other federal legislation, is premised upon Congress' "Power . . . [t]o regulate Commerce . . . among the several States."

Respectfully submitted,

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April 4, 2003

(4)

Supreme Court, U.S.
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No. 02-1295

In the
SUPREME COURT OF THE UNITED STATES

THE CITIZENS BANK,

Petitioner,

vs.

ALAFABCO, INC., DONNIE COTTINGHAM, JOANN BECK, AND WESTON BECK,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR ALABAMA PEST CONTROL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. The Petition presents an important question of federal law which should be resolved by this Court; namely, should the effects of interstate commerce be aggregated in considering whether the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, is applicable to an arbitration clause in a commercial contract between two intrastate actors?

II. Should this Court exercise its discretion to correct a misinterpretation by the Alabama Supreme Court of federal law, which is in conflict with every other state and federal circuit that has addressed the issue?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 3

REASONS FOR GRANTING THE PETITION 5

I. The effects of interstate commerce should be aggregated in considering whether the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, is applicable to an arbitration clause in a commercial contract between two intrastate actors. 5

A. *Wickard/Lopez* Require Aggregation in Cases Involving Economic Activities. 5

B. Alabama's Supreme Court Has Repeatedly Refused To Enforce Arbitration Agreements. 7

C. *Allied-Bruce Terminix* Mandates that Pest Control Arbitration Agreements be Enforced. 13

D. *Alafabco* and its Progeny Continue the Alabama Supreme Court's Intransigence. 14

II. This Court should exercise its discretion to correct a misinterpretation by the Alabama Supreme Court of federal law, which is in conflict with every other state and federal circuit that has addressed the issue. 17

CONCLUSION 19

INDEX TO APPENDICES

APPENDIX A – Opinion of the Alabama Supreme Court in *Bowen v. Security Pest Control, Inc.*, No. 1010783, 2003 Ala. Lexis 64 (Ala. Feb. 28, 2003) 1a

TABLE OF AUTHORITIES

Page

Cases cited:

Alafabco, Inc. v. Citizens Bank,
No. 1010703, 2002 Ala. Lexis 249
(Ala. Aug. 30, 2002). 2, 12-14

Allied-Bruce Terminix Companies, Inc. v. Dobson,
513 U.S. 265 (1995) 8, 9, 12-16, 19

Bowen v. Security Pest Control, Inc.,
No. 1010783, 2003 Ala. Lexis 64
(Ala. Feb. 28, 2003) 14-17

Brown v. Investors Mortgage Co.,
121 F.3d 472 (9th Cir. 1997) 18

Dailey v. Veneman,
2002 U.S. App. Lexis 24623
(6th Cir. 2002) 18

Durr v. Booker,
1997 U.S. App. Lexis 435
(10th Cir. 1997) 18

Ex parte Alabama Oxygen Co.,
433 So.2d 1158 (Ala. 1983) 7, 8

Ex parte Alabama Oxygen Co.,
452 So.2d 860 (Ala. 1984) 8

Ex parte Costa & Head (Atrium), Ltd.,
486 So.2d 1272 (Ala. 1986) 8

Ex parte Warren,
548 So.2d 157 (Ala. 1989) 8

Freedom Baptist Church of Delaware County v. Township of Middleton,
204 F.Supp.2d 587 (E.D.Pa. 2002) 18

Frier v. Westinghouse Electric Corp.,
303 F.3d 176 (2d Cir. 2002) 18

G.D.F. Realty Investments, Inc. v. Norton,
2003 U.S. App. Lexis 5818 (5th Cir. 2003)
. 18

Gibbs v. Babbitt,
214 F.3d 483 (4th Cir. 2000) 18

Haeberlin Farms, Inc. v. I.G.F. Insurance Co.,
641 N.W.2d 816 (Iowa 2002) 18

Hodel v. Virginia Surface Mining & Reclamation Association, 452 U.S.264 (1981). 7

Hurst v. Tony Moore Imports, Inc.,
699 So.2d 1249 (Ala. 1997) 9

National Association of Homebuilders v. Babbitt,
130 F.3d 1041 (D.C. App. 1997) 18

Perry v. Thomas,
482 U.S. 483 (1987) 5

Sisters of the Visitation v. Cochrane Plastering Co., Inc., 775 So.2d 759 (Ala. 2000) . . . . *passim*

United Property Owners Association v. Borough of Belmar, 777 A.2d 950 (N.J. Sup. 2001) 18

United States v. Lopez, 514 U.S. 549 (1995) ..... *passim*

United States v. Morrison, 529 U.S. 598 (2000) 6, 7, 11, 12

University of South Alabama Foundation v. Walley, 2001 U.S. Dist. Lexis 2975 (S.D. Ala. 2001) 18

Wickard v. Filburn, 317 U.S. 111 (1942] ..... *passim*

York International, et al. v. Alabama Oxygen Co., Inc., 465 U.S. 1016 (1984) 7

Statutes cited:

Ala. Code 1975, § 8-1-41(3) 7

18 U.S.C. §922(q) 10

9 U.S.C. §1 5

In the
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THE CITIZENS BANK,

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vs.

ALAFABCO, INC., DONNIE COTTINGHAM, JOANN BECK, AND WESTON BECK,

Respondents.

BRIEF FOR ALABAMA PEST CONTROL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Amicus curiae Alabama Pest Control Association[1] respectfully requests a Writ of Certiorari be issued to review the opinion of the Alabama Supreme Court in this case.

INTEREST OF THE AMICUS CURIAE

The Alabama Pest Control Association is a nonprofit, voluntary-membership, trade association

[1] Pursuant to Supreme Court Rule 37.6, amicus curiae Alabama Pest Control Association states that this brief was prepared in its entirety by amicus curiae and its counsel. No monetary contribution toward the preparation or submission of the brief was made by any person other than amicus curiae, its members, and its counsel.

organized to promote the interest of the pest control operators in the State of Alabama. Its membership includes not only pest control operators, but also suppliers, manufacturers, and consultants. Many members of the Alabama Pest Control Association are pest control firms doing business in two or more states. Each year Alabama pest control operators purchase millions of dollars of equipment, supplies and services from out of state manufacturers and providers. These supplies are transported across state lines and distributed within the State of Alabama as part of interstate commerce. Many of the pest control operators' termite contracts contain arbitration agreements. These arbitration agreements are effectively rendered unenforceable by the Alabama Supreme Court's decision in *Alafabco, Inc. v. Citizens Bank*, No. 1010703, 2002 Ala. Lexis 249 (Ala. Aug. 30, 2002).

This brief in support of Citizens Bank's petition for writ of certiorari is submitted to emphasize to this Court that the standard set by Alabama state courts for enforcing arbitration provisions effectively limits the plenary power of Congress, contradicts the federal policy favoring arbitration, defeats the primary purpose of the Federal Arbitration Act ("FAA") and denies members of the Alabama Pest Control Association their contracted-for right to arbitration.

Pursuant to Supreme Court Rule 37, both petitioner Citizens Bank and respondent Alafabco, Inc.

granted the Alabama Pest Control Association leave to file an amicus curiae brief supporting Citizens Bank's petition for writ of certiorari. A copy of the letters granting leave to file an amicus curiae brief is submitted contemporaneously with this amicus curiae brief.

SUMMARY OF THE ARGUMENT

This Court should grant the petition for certiorari to resolve a compelling federal question: Whether the Alabama Supreme Court can unilaterally refuse to apply the aggregation principle found in *Wickard v. Filburn*, 317 U.S. 111 (1942) and *Wickard*'s progeny in determining the applicability of the FAA to a commercial intrastate contract. This Court should further grant the writ to resolve a split among the states and between Alabama and the federal circuits with respect to this same issue.

In *Wickard*, this Court held that even local activities not generally regarded as commerce could be reached by Congress power to regulate commerce if the activity exerted a substantial economic effect on interstate commerce. This Court further emphasized that while that party's own contribution to the demand for wheat may be trivial by itself, that was "not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from

trivial." *Wickard*, 317 U.S. at 127-28 (internal cites omitted).

In *Sisters of the Visitation v. Cochrane Plastering Co., Inc.*, 775 So.2d 759 (Ala. 2000), the Alabama Supreme Court held that in order to trigger the FAA, the contract must substantially affect interstate commerce. *Id.* at 763. Since that decision, the Alabama Supreme Court has released an ever-growing body of decisions implicitly rejecting the aggregation principle and has held that in order to enforce an arbitration agreement in an intrastate contract, the party seeking to invoke arbitration must demonstrate that the contract involves a substantial effect upon interstate commerce. Further, the Alabama Supreme Court has refused to use the aggregation principle of *Wickard* and its progeny in determining whether a commercial activity has a substantial effect on interstate commerce.

REASONS FOR GRANTING THE PETITION

I. The effects of interstate commerce should be aggregated in considering whether the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, is applicable to an arbitration clause in a commercial contract between two intrastate actors.

A. *Wickard/Lopez* Require Aggregation in Cases Involving Economic Activities.

The Alabama Supreme Court has misapplied this Court's holding in *United States v. Lopez*, 514 U.S. 549 (1995) to deny the rights of thousands of Alabama's citizens to proceed to contracted-for arbitration.

Congress' authority under the FAA is expansive, and coincides with that granted under the Commerce Clause. *Perry v. Thomas*, 482 U.S. 483, 490 (1987). In *Wickard v. Filburn*, 317 U.S. 111 (1942), this Court held that under the Commerce Clause, Congress had the power to limit the production of wheat by a farmer whose crop size was minimal. This Court held that in determining the effects of an activity on interstate commerce, courts are to consider the aggregate effect of that type of activity on interstate commerce. *Id.* at 124-28. This Court further rejected the direct/indirect effects analysis of earlier decisions:

> Even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

Wickard, 317 U.S. at 125.

This Court's *Wickard* aggregation principle was reaffirmed in *United States v. Lopez*, *supra*, where this Court stated that for a federal statute which regulates commercial transactions to be a valid exercise of Congress' commerce power, the aggregate nationwide participation in that activity must substantially affect interstate commerce. *Lopez*, 514 U.S. at 556. Indeed, *Lopez* specifically requires that activities which arise out of or are connected with a commercial transaction are to be viewed in the aggregate to determine whether they substantially affect interstate commerce. *Id.* at 561.

In the more recent case of *United States v. Morrison*, 529 U.S. 598 (2000), this Court reaffirmed that *Wickard*'s aggregation principle applies in cases involving economic activity. *Morrison*, 529 U.S. at 611, n.4. This is in keeping with this Court's longstanding principle that even activity which is purely intrastate in character may be regulated by Congress where the

activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations. *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S.264 (1981).

This Court has therefore made it exceedingly clear that in Commerce Clause analysis of cases involving intrastate economic activity, the commercial activity is to be examined under the aggregation principle. *Morrison*, 529 U.S. at 611; *Lopez*, 514 U.S. at 561; *Hodel*, 452 U.S. at 277; *Wickard*, 317U.S. at 124-28.

B. Alabama's Supreme Court Has Repeatedly Refused To Enforce Arbitration Agreements.

In order to view this certiorari petition with the proper perspective, it is necessary to provide a brief background of the historical hostility of the Alabama Supreme Court towards arbitration. Alabama statutory law prohibits enforcement of an agreement to submit a controversy to arbitration. Ala. Code 1975, § 8-1-41(3). In *Ex parte Alabama Oxygen Co.*, 433 So.2d 1158 (Ala. 1983), the Alabama Supreme Court held that the FAA was not applicable in state courts. After this Court vacated the Alabama Supreme Court's judgment and remanded the case, *York International, et al. v. Alabama Oxygen Co., Inc.*, 465 U.S. 1016 (1984), the Alabama Supreme Court only grudgingly acknowledged that the FAA applied to cases brought in

courts in the State of Alabama. See *Ex parte Alabama Oxygen Co.*, 452 So.2d 860, 861 (Ala. 1984).

Following the *Ex parte Alabama Oxygen* opinions, the Alabama Supreme Court adopted the "slightest-nexus" test for arbitration, holding that the FAA applied in cases where the agreement had the slightest nexus with interstate commerce. *Ex parte Costa & Head (Atrium), Ltd.*, 486 So.2d 1272 (Ala. 1986). However, the Alabama Supreme Court abruptly rejected the "slightest-nexus" test in *Ex parte Warren*, 548 So.2d 157 (Ala. 1989). In *Warren*, the Alabama Supreme Court adopted the "contemplated substantial interstate activity" standard for determining whether the FAA applied in Alabama state courts; that is, whether the parties subjectively contemplated, at the time of contracting, that the subject of the contract would involve substantial interstate commerce. *Id.* at 159-60.

This Court specifically rejected this standard in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995), holding "[w]e find the interpretive choice difficult, but for several reasons we conclude that the first interpretation ('commerce in fact') is more faithful to the statute than the second ('contemplation of the parties')." *Id.* at 278. This Court further stated, "The parties do not contest that the transaction in this case, in fact, involved interstate commerce. In addition to the multistate nature of Terminix and

Allied-Bruce, the termite-treating and house-repairing material used by Allied-Bruce in its (allegedly inadequate) efforts to carry out the terms of the plan, came from outside Alabama." 513 U.S. at 282.

Following this Court's *Allied-Bruce Terminix* decision, the Alabama Supreme Court initially interpreted that case to hold that even an intrastate transaction involves interstate commerce if it has virtually any tangible effect on the generation of goods or services for interstate markets and their distribution to the customer. *Hurst v. Tony Moore Imports, Inc.*, 699 So.2d 1249, 1257 (Ala. 1997). Interestingly, *Hurst* also stated, "However, we do not view *Lopez* as signaling a retreat by the Supreme Court from its expansive interpretation of 'interstate commerce' in cases clearly involving commercial transactions." *Id.* at 1257.[2] However, this interpretation did not last.

In *Sisters of the Visitation v. Cochrane Plastering Co., Inc.*, 775 So.2d 759 (Ala. 2000), the Alabama Supreme Court revised its opinion of the FAA's scope again. The Alabama Supreme Court held that in order to trigger the FAA, the contract must "substantially affect" interstate commerce. *Id.* at 763. The Alabama Supreme Court based this revision upon language it erroneously interpreted as dicta in *United States v.*

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[2] The Alabama Supreme Court has not yet explained why its interpretation of *Lopez* changed so markedly from 1997 to 2000.

Lopez, *supra*. The *Sisters of the Visitation* Court established a five-part test for determining whether a contract "substantially affects" interstate commerce to such a degree as to trigger the FAA: (1) the citizenship of the parties; (2) the origin of any tools and equipment; (3) the allocation of cost of services and materials; (4) the subsequent movement across state lines of the object of the services; and (5) the degree of separability from other contracts. *Sisters of the Visitation*, 775 So.2d at 765-67.

The Alabama Supreme Court mischaracterized the language in *Lopez* as dictum to justify imposing the more stringent "substantially affects" test, without the *Wickard/Lopez* aggregation principle, for employing the FAA:

> The Lopez Court referred to the requirement of a substantial effect as generally applicable to regulation of economic activity. *Id.* at 560, 115 S.Ct. 1624. That broad reference, albeit dictum, does not suggest that the requirement of substantial effect would not apply to the question whether a particular contract is subject to the FAA.

Sisters of the Visitation, 775 So.2d at 761.

Lopez was a case involving 18 U.S.C. §922(q), the Gun-Free School Zones Act of 1990, and was not a true "commerce" case, a fact not lost upon the *Lopez*

Court. *Lopez*, 514 U.S. at 561 ("Section 922(q) is a criminal statute that by its terms has nothing to do with commerce or any sort of economic enterprise"). As this Court noted in *United States v. Morrison*, 529 U.S. at 609, several significant considerations led to this Court's decision in *Lopez*. First, and most important, the *Morrison* Court noted that *Lopez* involved analysis of a criminal statute that by its terms had nothing to do with commerce or any sort of economic enterprise. *Morrison*, 529 U.S. at 610. As *Morrison* explained:

> Both petitioners and Justice Souter's dissent downplay the role that the economic nature of the regulated activity plays in our Commerce Clause analysis. But a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case ... *Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.

Morrison, 529 U.S. at 610-11. More importantly, the Alabama Supreme Court simply ignored the inconvenient fact that *Lopez* reaffirmed that *Wickard*'s aggregation principle applies in cases involving

economic activity. *Lopez*, 514 U.S. at 561. See also *Morrison*, 529 U.S. at 611, n.4.

Lopez was released approximately three months after *Allied-Bruce Terminix*, and by its language did not modify the holding in that case; however, in *Sisters of Visitation*, released almost five years after *Lopez*, the Alabama Supreme Court discerned a heretofore-undiscovered requirement in *Lopez* that it must now employ the "substantial effect" test in arbitration cases. Since, the *Sisters of the Visitation* test looks at each commercial transaction in isolation, it does not employ the aggregation principle as plainly required by *Wickard* and its progeny.

Thus, in *Sisters of the Visitation*, the Alabama Supreme Court attempted to evade the United States Supreme Court's holding in *Wickard* so as to exclude local or indirect effects on interstate commerce unless the transaction, by itself, substantially affects interstate commerce. In short, the Alabama Supreme Court rejected, albeit *sub silentio*, *Wickard*'s aggregation principle, a fact noted in dissents in *Sisters of the Visitation*, 775 So.2d at 779 (Hooper, C.J., dissenting), and in *Alafabco*, 2002 Ala. Lexis at *30 (See, J., dissenting). This Court expressly commands use of the aggregation principle in *Wickard*; indeed, in *Wickard* this Court plainly stated "[t]hat appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from scope of

federal regulation, where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Wickard*, 317 U.S. at 127-28.

C. *Allied-Bruce Terminix* Mandates that Pest Control Arbitration Agreements be Enforced.

This Court's decision in *Allied-Bruce Terminix Cos., Inc. v. Dobson*, *supra*, succinctly summarized the scope of Congressional power under the Commerce Clause and established controlling principles regarding arbitration which the Alabama Supreme Court has ignored in *Alafabco* and its progeny. In *Allied-Bruce Terminix*, this Court held that the basic purpose of the FAA is to overcome court's refusals to enforce arbitration agreements and that the FAA's reach is expansive and coincides with that of the Commerce Clause. *Id.* at 270, 274-75. *Allied-Bruce Terminix* involved a pest control company which had an arbitration agreement in its contract. This Court reversed the Alabama Supreme Court's decision denying arbitration, finding that the case involved interstate commerce because of the multi-state nature of the defendants and because the termiticide and house repair materials used by defendants came from out of state. *Allied-Bruce Terminix*, 513 U.S. at 282. In reliance upon this Court's decision in *Allied-Bruce Terminix*, Alabama pest control operators began employing arbitration agreements in their customer

contracts. Contrary to the view of the Alabama Supreme Court, these arbitration agreements are due to be enforced under this Court's precedents.

D. *Alafabco* and its Progeny Continue the Alabama Supreme Court's Intransigence.

Sisters of the Visitation's progeny have extended and expanded the original error, and have jeopardized the rights of Alabama's pest control operators who acted in reliance upon *Allied-Bruce Terminix*. In *Alafabco*, No. 1010703, 2002 Ala. Lexis 249 (Ala. Aug. 30, 2002), the Alabama Supreme Court parsed a series of individual transactions between the parties so as to exclude indicia that Citizens Bank routinely conducts business outside the State of Alabama, that Alafabco owns and uses materials manufactured outside Alabama, and that Alafabco operates its business with funds borrowed from the Bank from consideration of the applicability of the FAA to the transactions in question. *Alafabco*, 2002 Ala. Lexis at *14.

The true absurdity of the *Sisters of the Visitation* and *Alafabco* holdings was demonstrated when the Alabama Supreme Court released its most recent decision in this line of cases in *Bowen v. Security Pest Control, Inc.*, No. 1010783, 2003 Ala. Lexis 64 (Ala. Feb. 28, 2003)(reproduced at App. 1a-28a). In *Bowen*, the Alabama Supreme Court extrapolated *Sisters of the*

Visitation and *Alafabco* to reach a result that was squarely at odds with this Court's decision in *Allied-Bruce Terminix, supra.*

In *Bowen*, the plaintiffs entered into a termite control contract with Security Pest Control (SPC) which contained an arbitration agreement. The plaintiffs subsequently sued in state court, alleging breach of contract and tort claims. SPC's motion to compel arbitration was granted by the trial court. The Alabama Supreme Court, relying on the *Sisters of the Visitation* factors, could not support arbitration unless the records demonstrated that the tools and equipment used by the pest control company were purchased or leased specifically for the project. It further held that in order to show a nexus with interstate commerce, SPC had to prove that it purchased the termiticide specifically for use on the Plaintiffs' house. *Bowen*, 2003 Ala. Lexis at *8-9.

Thus, *Bowen* refused to consider the aggregate effect of Alabama pest control industry's purchases of termiticide, tools, and equipment from out of state, a position squarely at odds with *Wickard*, *Lopez*, and *Allied-Bruce Terminix*. The *Bowen* opinion failed to reconcile its holding with the aggregation principle of *Wickard* and *Lopez*, despite a strongly-worded dissent raising *Wickard's* aggregation principle. *Bowen*, 2003 Ala. Lexis at *15-18 (See, J. dissenting). *Bowen* offered a weak distinction from the clearly

contradictory decision this Court issued in *Allied-Bruce Terminix*, stating, "However, unlike this case, 'the parties [in *Allied-Bruce Terminix*] did not contest that the transaction in [that] case ... involved interstate commerce.' " *Bowen*, 2003 Ala. Lexis at *10, n.3.

This attempt to distinguish *Bowen* from *Allied-Bruce Terminix* is disingenuous. First, this Court's decision in *Allied-Bruce Terminix* did not rest on the fact that neither party disputed that the transaction in that case affected interstate commerce; rather, the dispute hinged on the parties' subjective contemplation of whether the contract would affect interstate commerce. *Allied-Bruce Terminix*, 513 U.S. at 278. Second, the parties in *Bowen* did not contest that the case involved interstate commerce (plaintiffs did not contest SPC's affidavit that it purchased equipment and supplies from out of state); rather, the parties contested the extent of the contract's effect upon interstate commerce. Third, the *Bowen* opinion itself acknowledges that the pest control company's termiticide was purchased outside the State of Alabama. *Bowen*, 2003 Ala. Lexis at *8-9. This same factor was a major reason for this Court's finding that the pest control contract in *Allied-Bruce Terminix* affected interstate commerce. *Allied-Bruce Terminix*, 513 U.S. at 282. Plainly put, the Alabama Supreme Court's attempts in *Bowen* to distinguish the facts of that case from those of *Allied-Bruce Terminix* are more pretextual than substantive.

The holding in *Bowen* that SPC must demonstrate that the tools, equipment and termiticide used in treating the plaintiffs' house were purchased or leased specifically for that contract. *Bowen*, 2003 Ala. Lexis at *6-9, in order to prove a substantial effect on interstate commerce sufficient to trigger the FAA is defiantly contrary to this Court's longstanding aggregation principle in economic cases. It is not possible to reconcile *Bowen* with this Court's line of cases applying the *Wickard* aggregation principle.

The effect of this new line of Alabama cases on the Alabama pest control industry will be to eliminate the possibility of arbitrating disputes arising out of pest control contracts. Very few, if any, pest control operators purchase equipment or supplies for each individual contract.

II. This Court should exercise its discretion to correct a misinterpretation by the Alabama Supreme Court of federal law, which is in conflict with every other state and federal circuit that has addressed the issue.

Finally, amicus curiae Alabama Pest Control Association urges this Court to grant certiorari because the issue discussed in Issue I is the subject of a split among the states and circuits. The Alabama Supreme Court's holding regarding the aggregation principle in Commerce Clause economic cases is in conflict with the virtually every other court which has addressed the question.

More particularly, the *Sisters of the Visitation* holding is in conflict with the following decisions in other states and circuits, all of which employ the aggregation principle, either expressly or impliedly, in determining the reach of the Commerce Clause in intrastate commercial contracts. See, e.g., *Frier v. Westinghouse Electric Corp.*, 303 F.3d 176, 200-01 (2d Cir. 2002); *Gibbs v. Babbitt*, 214 F.3d 483, 493 (4th Cir. 2000); *G.D.F. Realty Investments, Inc. v. Norton*, 2003 U.S. App. Lexis 5818, *15-16 (5th Cir. 2003); *Dailey v. Veneman*, 2002 U.S. App. Lexis 24623, *12-13 (6th Cir. 2002); *Brown v. Investors Mortgage Co.*, 121 F.3d 472, 476 (9th Cir. 1997); *Durr v. Booker*, 1997 U.S. App. Lexis 435, *4 (10th Cir. 1997); *National Association of Homebuilders v. Babbitt*, 130 F.3d 1041, 1046 (D.C. App. 1997); *University of South Alabama Foundation v. Walley*, 2001 U.S. Dist. Lexis 2975, *13-14 (S.D. Ala. 2001); *Freedom Baptist Church of Delaware County v. Township of Middleton*, 204 F.Supp.2d 587 (E.D.Pa. 2002); *Haeberlin Farms, Inc. v. I.G.F. Insurance Co.*, 641 N.W.2d 816 (Iowa 2002); and *United Property Owners Association v. Borough of Belmar*, 777 A.2d 950 (N.J. Sup. 2001).

All other jurisdictions follow this Court's requirement, as they must, that in determining whether the Commerce Clause controls in economic cases, the aggregation principle is used to determine whether the activity has a substantial effect upon interstate commerce. This Court should exercise its

discretion to bring Alabama into conformity with the above-cited authorities and with the decisions in *Wickard* and *Lopez*.

CONCLUSION

This Court should grant Citizens Bank's petition for certiorari to reaffirm its decisions in *Wickard*, *Allied-Bruce Terminix*, and *Lopez* regarding the primacy of the FAA in cases involving aggregated effects on interstate commerce, and also to resolve the conflict between the Alabama Supreme Court and other jurisdictions (including this Court) which have examined this issue.

The petition for writ of certiorari of Citizens Bank should be granted.

Respectfully submitted,

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April 4, 2003

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APPENDIX A

Michael Bowen and Britta Bowen v. Security Pest Control, Inc.

1010783

SUPREME COURT OF ALABAMA

2003 Ala. LEXIS 64

February 28, 2003, Released

PRIOR HISTORY:
Appeal from Tallapoosa Circuit Court. (CV-01-093).

DISPOSITION:
REVERSED AND REMANDED.

JUDGES:
BROWN, Justice. Houston, Lyons, Johnstone, Harwood, and Woodall, JJ., concur. Moore, C.J., concurs in the result. See, J., dissents.

OPINION BY:
BROWN

OPINION:
BROWN, Justice.

The plaintiffs, Michael Bowen and Britta Bowen, appeal from an order of the Tallapoosa Circuit Court compelling them to arbitrate their claims against defendant Security Pest Control, Inc. ("SPC"). We reverse and remand.

In April 1999, Michael Bowen entered into a termite control agreement ("the contract") with SPC pursuant to which SPC agreed to treat the Bowens' house for termites. The contract indicated that the cost of the treatment was $ 1,490, and it contained the following arbitration provision:

"In the event of a dispute between [SPC] and/or its employees and Customer with respect to interpretation of the terms and conditions of this agreement, including the making of this agreement, or breach of any provision of this agreement, the parties hereby expressly agree to submit their dispute to binding arbitration for resolution in accordance with the rules and requirements of the American Arbitration Association. The parties acknowledge and understand that by agreeing to submit their dispute to binding arbitration they are effectively waiving their right to trial by jury as a means of resolving disputes. Furthermore, the parties acknowledge that they desire to arbitrate any dispute arising from this agreement in an effort to resolve such dispute(s) quickly and avoid the costs of litigation. The parties further agree that any arbitration proceedings shall take place in Alexander City, Alabama."

SPC treated the Bowens' house with a termiticide called "Navigator TC." The treatment process included boring holes under the Bowens' house with special drilling equipment.

In June 2000, the Bowens discovered that termites had damaged their house. Specifically, they allege that termites had destroyed approximately 33 1/3% of the entire structure of their house, and that it will cost $ 50,000 to repair the damage. In May 2001, the Bowens brought this action against SPC, asserting numerous claims, including breach of contract, negligence, and fraud. In August 2001, SPC moved the trial court to compel arbitration. The trial court granted SPC's motion, and the Bowens appeal.

Standard of Review

Our standard of review of an order compelling arbitration is well settled:

"This Court's review of an order granting a motion to compel arbitration is de novo. See *W.D. Williams, Inc. v. Ivey, 777 So. 2d 94 (Ala. 2000); Patrick Home Ctr., Inc. v. Karr, 730 So. 2d 1171 (Ala. 1999).* Therefore, this Court must determine 'whether the trial judge erred on a factual or legal issue to the substantial prejudice of the party seeking review.' *Ex parte Roberson, 749 So. 2d 441, 446 (Ala. 1999).*"

BankAmerica Hous. Servs. v. Lee, 833 So. 2d 609, 617 (Ala. 2002). Furthermore:

"A motion to compel arbitration is analogous to a motion for a summary judgment. *TranSouth Fin. Corp. v. Bell, 739 So. 2d 1110, 1114 (Ala. 1999).* The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration and proving that that contract evidences a transaction affecting interstate commerce. Id. 'After a motion to compel arbitration has been made and supported, the burden is on the non-movant to present evidence that the supposed arbitration agreement is not valid or does not apply to the dispute in question.' *Jim Burke Automotive, Inc. v. Beavers, 674 So. 2d 1260, 1265 n.1 (Ala. 1995)* (opinion on application for rehearing)."

Fleetwood Enters., Inc. v. Bruno, 784 So. 2d 277, 280 (Ala. 2000).

Discussion

Federal law demands the enforcement of written arbitration agreements that "'substantially affect[] interstate commerce.'" *Ballard Servs., Inc. v. Conner, 807 So. 2d 519, 521 (Ala. 2001)* (quoting *Sisters of the Visitation v. Cochran Plastering Co., 775 So. 2d 759, 767 (Ala. 2000)*); see also the Federal Arbitration Act, *9 U.S.C. § 1* et seq. ("the FAA"). Moreover, the burden of proving that a transaction substantially affects

interstate commerce is on the party attempting to compel arbitration. *Jim Burke Auto., Inc. v. McGrue, 826 So. 2d 122, 129 (Ala. 2002).* If that party fails to make such a showing, "the burden of proof does not shift to the opposing party and the motion should be denied." *Ex parte Greenstreet, Inc., 806 So. 2d 1203, 1207 (Ala. 2001).*

In Sisters of the Visitation, this Court set out five factors to be used in determining whether a transaction substantially affected interstate commerce. Those factors include: "(1) citizenship of the parties; (2) where the tools and equipment originated; (3) allocation of costs of services and materials; (4) subsequent movement across state lines; and (5) degree of separability from other contracts." Aronov Realty Brokerage, Inc. v. Morris, [Ms. 1001292, April 26, 2002] ___ So. 2d ___, ___, *2002 Ala. LEXIS 129 (Ala. 2002)* (citing Sisters of the Visitation). Applying those five factors to the particular facts of this case, we conclude that SPC did not demonstrate that this transaction had a substantial impact on interstate commerce.

1. Citizenship of the Parties

It is undisputed that the Bowens are both citizens of Alabama. Moreover, SPC is an Alabama corporation with its principal place of business in Alexander City, Alabama.

2. Origination of the Tools and Equipment

In an affidavit supporting the motion to compel arbitration, Mike Booker, the owner of SPC, claims that some of the tools and equipment used to treat the Bowens' house were purchased from out-of-state companies. Specifically, Booker states that the drilling equipment used to bore into the earth below the Bowens' house was purchased from Jim Simmons Company, located in Nashville, Tennessee. Attached to the affidavit are invoices from Jim Simmons Company for the purchase of a drill bit, purchased in January 1999 for approximately $ 150; a rotary hammer, purchased in February 1999 for approximately $ 500; and an adapter, purchased in March 1999 for approximately $ 126. Also, Booker indicates that the company truck used during the treatment of the Bowens' house was purchased in Roswell, Georgia, in April 1996.

The second factor--origination of the tools and equipment--"cannot support arbitrability unless the record demonstrates the extent to which tools and equipment moving interstate were 'leased or purchased specially for the project.'" Brookfield Constr. Co. v. Van Wezel, [Ms. 1010353, June 28, 2002] ___ So. 2d ___, ___, *2002 Ala. LEXIS 204 (Ala. 2002)* (quoting *Sisters of the Visitation, 775 So. 2d at 766).* It is apparent that the truck used during the treatment of the Bowens' house was purchased three years before the Bowens entered into the contract with SPC; thus, it was most likely not purchased specially for

treating the Bowens' house. Furthermore, it is unclear whether the drilling equipment, which was purchased before the execution of the contract with the Bowens, was purchased with that contract in mind. Because the record is silent as to the extent the truck and the drilling equipment were purchased specifically for the performance of this contract, i.e., for treating the Bowens' house, "no substantial effect on interstate commerce can be developed based on [SPC's] acquiring in interstate commerce any tools and equipment to be used in the performance of this contract." *Sisters of the Visitation, 775 So. 2d at 766.* See also Brookfield Constr. Co., ___ So. 2d at ___, 2002 Ala. LEIXS 204 at *4 (holding that the defendant failed to show the extent to which a construction project affected interstate commerce because, in part, the record "failed to show the extent to which tools and equipment moving interstate were 'leased or purchased specially for the project'" (quoting *Sisters of the Visitation, 775 So. 2d at 766)*); Aronov Realty Brokerage, Inc., supra (same).

3. Allocation of Costs of Services and Materials

SPC claims that the termiticide used to treat the Bowens' house was purchased from an out-of-state company and traveled in interstate commerce. Specifically, Booker's affidavit indicates that the Navigator TC used to treat the Bowens' house was manufactured in Brookfield, Connecticut. Booker also claims that SPC orders the chemical through VoPak, a national distributor of the product. The termiticide is

shipped from Connecticut to Atlanta, Georgia, where VoPak's southeastern regional office is located. It is then shipped to Birmingham before it is ultimately delivered to SPC in Alexander City.

Instead of addressing whether the specific Navigator TC used to treat the Bowens' house was purchased in this manner, Booker's affidavit gives only the general procedure SPC uses for purchasing the termiticide. It does not indicate whether the Navigator TC used in treating the Bowens' house was purchased specifically for that project, or whether it was instead purchased at a previous time for use in all contracts. n1

n1 The Bowens, in their brief to this Court, argue that the Navigator TC "came-to-rest" in Birmingham before it was purchased by SPC from VoPak. See *Ex parte Kampis, 826 So. 2d 819, 822 (Ala. 2002)* (explaining that, under the come-to-rest doctrine, when a product, which has moved in interstate commerce, reaches stores in Alabama, its flow in interstate commerce has ceased). SPC, on the other hand, argues that the Navigator TC stopped in Birmingham merely for "distribution" purposes. The record does not clearly indicate which is the case.

Because "the record provides no information from which we can determine what portion of the amount [the Bowens] paid [SPC] is allocable to the cost of local labor and overhead and what portion is allocable to materials or services specifically purchased for use or consumption in performance of the contract," SPC has not presented "sufficient evidence to justify the conclusion that [the Bowens'] contract substantially affects interstate commerce by reason of dependence upon materials and services moving in interstate commerce." *Sisters of the Visitation, 775 So. 2d at 766.* See also Brookfield Constr. Co., supra; Aronov Realty Brokerage, supra.

4. Subsequent Movement Across State Lines

As was the case in Sisters of the Visitation, the object of the services provided by the contract in this case, i.e., the Bowens' house, is incapable of movement across state lines. *775 So. 2d at 766.* Moreover, there is no allegation that the treatment of the structure with termiticide is capable of movement across state lines. Therefore, this factor is inapplicable in this case. n2

n2 In their discussion of this factor, SPC claims that because Navigator TC is regulated under the Federal Insecticide, Fungicide, and Rodenticide Act, *7 U.S.C. § 136* et seq., the use of this chemical triggers application of the FAA.

However, the fact that the chemical used in treating the house is regulated by the federal government does not demonstrate how the transaction is subject to subsequent movement across state lines. Moreover, as we explained in Alafabco, Inc. v. Citizens Bank, [Ms. 1010703, August 30, 2002] ___ So. 2d ___, ___, *2002 Ala. LEXIS 249 (Ala. 2002)*: "Holding that a transaction is subject to the FAA simply by virtue of ... Congressional regulation of some aspect of one party's business[] would effectively transform every 'local' transaction into a 'national' one."

5. Degree of Separability From Other Contracts

This Court has stated that this factor "cannot support arbitrability, unless the record demonstrates the extent of the subject transaction's 'impact on other contracts that do substantially affect interstate commerce.'" Brookfield Constr. Co., ___ So. 2d at ___, *2002 Ala. LEXIS 204* at *4 (quoting *Sisters of the Visitation, 775 So. 2d at 767;* emphasis added in Brookfield Constr. Co.). As SPC notes, this factor has no impact in this case; thus, we need not address it.

Conclusion

We hold that the record in this case does not demonstrate that the transaction at issue substantially

affected interstate commerce under the test set forth in Sisters of the Visitation. n3 Therefore, we reverse the trial court's order compelling arbitration and remand the case for proceedings consistent with this opinion.

n3 We note that *Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 130 L. Ed. 2d 753, 115 S. Ct. 834 (1995),* is distinguishable from the instant case. In Allied-Bruce, the United States Supreme Court held that claims by homeowners against a termite-control service provider were enforceable under the FAA if the transaction to which the contracts related involved interstate commerce, regardless of the contemplation of the parties. *Id. at 281.* However, unlike this case, "the parties [in Allied-Bruce] did not contest that the transaction in [that] case ... involved interstate commerce." *513 U.S. at 282.*

REVERSED AND REMANDED.

Houston, Lyons, Johnstone, Harwood, and Woodall, JJ., concur.

Moore, C.J., concurs in the result.

See, J., dissents.

DISSENT BY:
SEE

DISSENT:

SEE, Justice (dissenting).

The main opinion states that under the five-part test adopted in *Sisters of the Visitation v. Cochran Plastering Co., 775 So. 2d 759 (Ala. 2000)*, "we conclude that Security Pest Control, Inc. ("SPC") did not demonstrate that this transaction had a substantial impact on interstate commerce." I respectfully dissent.

Standard of Review

This Court reviews de novo a trial court's grant or denial of a motion to compel arbitration. Parkway Dodge, Inc. v. Hawkins, [Ms. 1010898, February 7, 2003] ___ So. 2d ___, *2003 Ala. LEXIS 30 (Ala. 2003); Tefco Fin. Co. v. Green, 793 So. 2d 755 (Ala. 2001);* see also Rule 4(d), Ala. R. App. P. This Court has held that "'to prevail on an assertion of arbitrability, the moving party is required to produce some evidence which tends to establish its claim,'" *Jim Burke Auto., Inc. v. Beavers, 674 So. 2d 1260, 1265 (Ala. 1995)* (opinion on rehearing) (quoting *In re American Freight Sys., Inc., 164 B.R. 341, 345 (D. Kan. 1994)*), and "'has the burden of proving the existence of a contract calling for arbitration and proving that that contract involves a transaction affecting interstate commerce,'" *Tefco Fin. Co. v. Green, 793 So. 2d at 758*(quoting *Ex parte Caver, 742 So. 2d 168, 172 n.4 (Ala. 1999)*)(emphasis added).

Commerce Clause Jurisprudence

In 1824, in *Gibbons v. Ogden, 22 U.S.(9 Wheat.) 1, 6 L. Ed. 23 (1824)*, the Supreme Court of the United States addressed the scope of the Commerce Clause. The New York Legislature had granted Ogden a monopoly "right to navigate waters" between Elizabethtown, New Jersey, and New York, New York. Id. Gibbons had infringed that right by operating two ships on the Elizabethtown-New York route, and the New York court had enjoined Gibbons's operation. The Supreme Court of the United States reversed, finding that navigation was commerce and that Congress's power over commerce preempted New York's licensing scheme. Chief Justice Marshall, writing for the Court, stated:

"Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. ...

"....

"The subject to which the power is next applied, is to commerce 'among the several States.' The word 'among' means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior."

22 U.S. (9 Wheat.) at 189-94. Chief Justice Marshall continued:

"It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. ...

"... The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."

22 U.S. (9 Wheat.) at 194-95.

Nonetheless, it was not until 1887 that the passage of the Interstate Commerce Act, *15 U.S.C. § 1,* "ushered in a new era of federal regulation under the commerce power." *United States v. Lopez, 514 U.S. 549, 554, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995).* Then, in 1937, in response to the New Deal legislation, the Supreme Court of the United States upheld the National Labor Relations Act and the National Labor Relations Board's decision to end the practice of discharging employees for union activity. *NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 81 L. Ed. 893,*

57 S. Ct. 615 (1937). n4 The Supreme Court held that intrastate activities could "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions ...." *Id. at 37.*

n4 In NLRB v. Jones & Laughlin Steel Corp., the National Labor Relations Act was challenged in its entirety as an attempt to regulate not only commerce but all industry; however, the Court addressed only the actions that burdened or obstructed commerce.

Four years later, the Supreme Court upheld the Fair Labor Standards Act, which regulated the hours and wages of employees engaged in local manufacturing and prohibited the shipment of goods produced by manufacturers that were paying their employees less than the prescribed minimum wage or that were requiring more than the prescribed maximum number of hours of work. *United States v. Darby, 312 U.S. 100, 85 L. Ed. 609, 61 S. Ct. 451 (1941).* In Darby, the Court reaffirmed the notion that substantial intrastate activities could affect interstate commerce. Subsequently, the Supreme Court stated that "activities that affected interstate commerce directly were within Congress' power; activities that affected interstate commerce indirectly were beyond

Congress' reach." *Lopez, 514 U.S. at 555*, citing *A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 546, 79 L. Ed. 1570, 55 S. Ct. 837 (1935)*(emphasis added).

In 1942, in *Wickard v. Filburn, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 (1942)*, the Supreme Court of the United States held that, under the Commerce Clause, Congress had the power to limit the production of wheat by a farmer who had sowed 23 acres of wheat for consumption on his own farm. n5 The Supreme Court instructed, first, that in weighing the effect of an activity on interstate commerce, courts are to consider the aggregate effect of that type of activity on interstate commerce. *317 U.S. at 124-28;* see also *Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 277, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981); Tefco Fin. Co., 793 So. 2d at 759.* Furthermore, the Wickard Court expressly rejected the earlier "direct-/indirect-effects" analysis of interstate commerce; thus, the Court stated:

"Even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" n6

n5 Filburn had challenged the constitutionality of the Agricultural Adjustment Act, which established a wheat-acreage allotment of 11.1 acres and a normal yield of 20.1 bushels of wheat per acre. *Wickard, 317 U.S. at 114.*

n6 In *Sisters of the Visitation v. Cochran, 775 So. 2d 759, 764 (Ala. 2000)*, the case on which the majority relies for its decision, a majority of this Court, interpreting Wickard, stated:

"We conclude that the question whether the actions of an individual, which actions standing alone would be considered 'local' actions or actions with only an 'indirect' influence on interstate commerce, may be considered to have a substantial influence on interstate commerce is to be determined by considering how critical the regulation of all similarly situated persons' activity is to the accomplishment of the primary purpose of a statute drawn to regulate an activity clearly having a substantial effect on interstate commerce."

Thus, in Sisters of the Visitation this Court purported to modify the United States Supreme Court's Wickard decision to exclude local or indirect effects unless those effects are sufficiently "critical" to the primary purpose of the statute. In the language recited from Wickard, the United States Supreme Court

> expressly rejected this kind of direct-indirect analysis; it was rejected for good reason because of the infinite malleability of the concept of directness. *Wickard, 317 U.S. at 125.*

317 U.S. at 125. The Wickard Court noted that the fact that Filburn's contribution to the demand for wheat "may be trivial by itself is not enough to remove him from the scope of federal regulation, where ... his contribution, taken together with that of many others similarly situated, is far from trivial." *Id. at 127-28.*

For over 50 years, following Wickard and up until *Lopez, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624,* the Supreme Court did not overturn a congressional act on the basis that the act violated the Commerce Clause. Then, in Lopez, the Supreme Court found that the relationship between the Gun-Free School Zones Act and interstate commerce was too attenuated to find a substantial effect on commerce. n7 Lopez was convicted of possession of a firearm in a school zone in violation of the Gun-Free School Zones Act. Reviewing several Commerce Clause cases, the Court identified three categories of activity Congress may regulate under its commerce power:

> n7 Justice Kennedy, concurring specially, and joined by Justice O'Connor, said that the Gun-Free School Zones Act "upsets the federal

> balance to a degree that renders it an unconstitutional assertion of the commerce power ...." *Lopez, 514 U.S. at 580* (Kennedy, J., concurring specially).

"First, Congress may regulate the use of the channels of interstate commerce. ... Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. ... Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, ... i.e., those activities that substantially affect interstate commerce."

514 U.S. at 558-59.

The government had argued in Lopez that crime in and around schools has a substantial effect on interstate commerce because "the costs of violent crime are substantial" and "violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe." *Id. at 563-64.* The Supreme Court, however, refused to accept the government's argument because, it reasoned, the Gun-Free School Zones Act had "nothing to do with 'commerce.'" n8 *Id. at 561.* Lopez did not overrule Wickard, but instead restricted the application of the Commerce Clause power to matters of commerce. n9

n8 The Court noted that if the Gun-Free School Zones Act passed constitutional muster, "it is difficult to perceive any limitation on federal power ...." *514 U.S. at 564.*

n9 In United States v. Ballinger, the United States Court of Appeals for the Eleventh Circuit discussed the Lopez restriction on the application of the Commerce Clause, stating:

"The talismanic repetition over the years of the phrase 'fullest extent' of congressional commerce power has led some to confuse this concept of the outer limits of congressional authority for an independent grant of authority. ...

"Perhaps this confusion springs from a failure to distinguish between regulation of economic as opposed to non-economic activity. When the regulated intrastate activity is a commercial or economic one, the Constitution permits the required substantial effect on interstate commerce to be located in the aggregate impact of the regulated activity upon interstate commerce. *Wickard v. Filburn, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942).* ... The Constitution permits such aggregation of effects to justify congressional regulation of purely intrastate economic activity when the absence of such regulation would undercut a larger

regulatory scheme affecting interstate commerce. *Lopez, 514 U.S. at 561, 115 S. Ct. 1624.*

"No such aggregation of local effects is constitutionally permissible in reviewing congressional regulation of intrastate, non-economic activity. *United States v. Morrison, 529 U.S. 598, 617, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000)* [striking down the Violence Against Women Act as an unconstitutional federal regulation of intrastate, non-economic, criminal behavior].... No aggregation of local effects is permissible to elevate a non-economic activity's insubstantial effect on interstate commerce into a substantial one in order to support federal jurisdiction. [*Lopez, supra*]."

United States v. Ballinger, 312 F.3d 1264 (11th Cir. 2002).

The Federal Arbitration Act

The Supreme Court of the United States held in *Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 76 L. Ed. 282, 52 S. Ct. 166 (1932),* that the Federal Arbitration Act ("the FAA") is a constitutional exercise of Congress's power. The FAA provides:

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy

thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

9 U.S.C. § 2. "The [FAA] preempts contrary state law (specifically, contrary law based on *Ala. Code 1975, § 8-1-41(3),*[n10] and public policy) and renders enforceable a written predispute arbitration agreement but only if that agreement appears in a contract evidencing a transaction that 'involves' interstate commerce." *Southern United Fire Ins. Co. v. Knight, 736 So. 2d 582, 585-86 (Ala. 1999);* see *Tefco Fin. Co. v. Green, supra.*

n10 *Alabama Code 1975, § 8-1-41(3),* makes void any agreement to arbitrate future, as opposed to present, disputes.

The Supreme Court of the United States has broadly interpreted the term "involving commerce" as being the "functional equivalent" of the phrase "affecting commerce." *Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 274, 130 L. Ed. 2d 753, 115 S. Ct. 834 (1995).* Congress's use of the phrase "affecting commerce" "normally signals Congress' intent to exercise its Commerce Clause powers to the full ...." *Id. at 273.*

In *Sisters of the Visitation v. Cochran Plastering Co., 775 So. 2d 759 (Ala. 2000),* the Sisters of the Visitation contracted with an in-state contractor to renovate a chapel located in Alabama and owned by the Sisters. Pursuant to an arbitration provision in the contract, the Sisters sought arbitration of their dispute with the contractor. In my dissent in that case, I noted that the majority held that the FAA can apply to a contract only if that "individual transaction 'substantially affects' interstate commerce." *775 So. 2d at 782.*

From the time of our decision in Sisters of the Visitation in March 2000, this Court has routinely denied a party the right to arbitration where that party failed to prove that the individual transaction substantially affected interstate commerce. See McConnell Auto. Corp. v. Jackson, [Ms. 1010006, November 1, 2002] ___ So. 2d ___, *2002 Ala. LEXIS 319 (Ala. 2002)* (denying arbitration in an action brought by a cash purchaser of a used car); Brookfield Constr. Co. v. Van Wezel [Ms. 1010353, June 28, 2002] ___ So. 2d ___, *2002 Ala. LEXIS 204 (Ala. 2002)* (denying arbitration in an action brought by homeowners against a construction company); Alafabco, Inc. v. Citizens Bank, [Ms. 1010703, August 30, 2002] ___ So. 2d ___, *2002 Ala. LEXIS 249 (Ala. 2002)* (denying arbitration in an action by a builder against the bank that provided financing for the builder's projects); Aronov Realty Brokerage, Inc. v. Morris, [Ms. 1001292, April 26, 2002] ___ So. 2d ___, *2002 Ala. LEXIS 129 (Ala. 2002)* (denying arbitration in an action brought

by a purchaser of a condominium unit against a real estate brokerage, real estate agent, and condominium association); *Liberty Nat'l Life Ins. Co. v. Douglas, 826 So. 2d 806 (Ala. 2002)* (refusing to compel arbitration where an employee of an insurance company sued her employer); *Ex parte Kampis, 826 So. 2d 819 (Ala. 2002)* (denying arbitration in an action brought by a home purchaser against a contractor); *Alternative Fin. Solutions, LLC v. Colburn, 821 So. 2d 981 (Ala. 2001)* (denying arbitration where borrowers brought an action against lenders challenging the legality of certain loans); *Ex parte Learakos, 826 So. 2d 782 (Ala. 2001)*(denying arbitration in an action brought by a home purchaser against a real estate company and its agents).

The Supreme Court of the United States stated in Lopez that in order for a federal statute that regulates commercial transactions to be a valid exercise of Congress's Commerce Clause power, the aggregate nationwide participation in that activity -- not the individual transaction in isolation -- must "substantially affect" interstate commerce. *Lopez, 514 U.S. 549 at 556, 131 L. Ed. 2d 626, 115 S. Ct. 1624.* This "substantial-effect" test -- used to determine the constitutionality of a statute under the Commerce Clause -- was not a new standard created in Lopez, but has been the test of a statute's constitutionality since the early twentieth century. *Id. at 555-57.*

Once it has been determined that Congress acted within its Commerce Clause power in enacting a

statute, whether that statute reaches certain activities does not depend on whether that individual act, when considered separately from all similar acts, has a substantial effect on commerce. As Wickard made clear, Filburn's "trivial" wheat production could be reached by the Agricultural Adjustment Act. The standard established by the Supreme Court of the United States is that "'where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.'" *Lopez, 514 U.S. at 558* (quoting *Maryland v. Wirtz, 392 U.S. 183, 197 n.27, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968)).*

The standard for the application of the FAA to an individual contract was made clear in *Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 267, 130 L. Ed. 2d 753, 115 S. Ct. 834 (1995).* The FAA provides in pertinent part that "[a] written provision in ... a contract evidencing a transaction involving commerce ... shall be valid ...." *9 U.S.C. § 2* (emphasis added). The Supreme Court of the United States held in Allied-Bruce Terminix that the requirement in the FAA that an individual contract involve interstate commerce should be read in the broadest possible terms because the word "involving" signals "an intent to exercise Congress' commerce power to the full." *513 U.S. at 277.* The Court also stated that to be subject to the FAA a contract did not have to evidence a transaction that was "'substantially' interstate." *Id. at 269.*

Thus, I believe this Court erred when it held in Sisters of the Visitation that a particular contract, in order to be enforceable under the FAA must, by itself, have a substantial effect on interstate commerce, and this Court errs again today by applying the Sisters of the Visitation standard to this case.

The Supreme Court's analysis in Allied Bruce-Terminix recognized the substantial impact that the pest-control industry has upon interstate commerce. The contract at issue in that case, much like the contract between SPC and the Bowens in this case, was between an Alabama homeowner and an Alabama office of a pest-control company, and it involved an agreement to initially treat the house and then to re-treat it for as long as the contract remained in place. In contrast to the present case, the parties in Allied-Bruce Terminix "did not contest that the transaction in [that] case, in fact, involved interstate commerce." *Allied Bruce-Terminix, 513 U.S. at 282.* However, the grounds upon which the Supreme Court found that the contract did involve interstate commerce were that "in addition to the multistate nature of Terminix and Allied-Bruce, the termite-treating and house-repairing material used by Allied-Bruce in its (allegedly inadequate) efforts to carry out the terms of the [Termite-Protection] Plan, came from outside Alabama." *513 U.S. at 282.*

In *Southern Energy Homes, Inc. v. McCray, 788 So. 2d 882, 883 (Ala. 2000),* this Court also recognized that

using materials acquired outside Alabama to complete a project in Alabama can provide a link to interstate commerce sufficient to invoke the FAA. This Court held in that case that the purchase of a home manufactured in Alabama involved interstate commerce where the home was constructed from parts acquired outside Alabama.

In this case, Booker, the owner of SPC, stated in his affidavit that the "Navigator TC" termiticide used on the Bowens' house was manufactured in Connecticut and that SPC ordered it from a business in Atlanta, Georgia. Booker also stated in his affidavit that SPC purchased the company truck used in treating the Bowens' house in Georgia and the tools used to bore under the house to deliver the termiticide from Tennessee. Additionally, Booker stated that SPC maintains licenses to perform pest-control services in Georgia. Therefore, although it is undisputed that the contract for the pre-treatment of the Bowens' home and the continued pest-control treatment of the home is activity that occurred within Alabama, SPC and Booker have presented the requisite "'some evidence which tends to establish [their] claim,'" *Jim Burke Auto., Inc. v. Beavers, 674 So. 2d at 1265* (opinion on rehearing) (quoting *In re American Freight Sys., Inc., 164 B.R. at 345),* that the pest-control contract between SPC and the Bowens, considered in the aggregate, substantially affects interstate commerce.

SPC has shown that the contract provides for binding arbitration and that Michael Bowen signed

that contract. Although Britta Bowen did not sign the pest-control contract, the arbitration provision is nevertheless enforceable against her because she alleges a breach of that contract. *Ex parte Dyess, 709 So. 2d 447, 451 (Ala. 1997)* (a party who seeks the benefits of a contract is bound by all provisions of the contract, not just those he or she chooses to enforce).

The trial court correctly enforced the written arbitration agreement contained in the contract. I would affirm the trial court's order granting the motion to compel arbitration; therefore, I dissent.

Per Curiam

SUPREME COURT OF THE UNITED STATES

THE CITIZENS BANK *v.* ALAFABCO, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

No. 02–1295. Decided June 2, 2003

PER CURIAM.

The question presented is whether the parties' debt-restructuring agreement is "a contract evidencing a transaction involving commerce" within the meaning of the Federal Arbitration Act (FAA). 9 U. S. C. §2. As we concluded in *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U. S. 265 (1995), there is a sufficient nexus with interstate commerce to make enforceable, pursuant to the FAA, an arbitration provision included in that agreement.

I

Petitioner The Citizens Bank—an Alabama lending institution—seeks to compel arbitration of a financial dispute with respondents Alafabco, Inc.—an Alabama fabrication and construction company—and its officers. According to a complaint filed by respondents in Alabama state court, the dispute among the parties arose out of a series of commercial loan transactions made over a decade-long course of business dealings. In 1986, the complaint alleges, the parties entered into a quasi-contractual relationship in which the bank agreed to provide operating capital necessary for Alafabco to secure and complete construction contracts. That relationship began to sour in 1998, when the bank allegedly encouraged Alafabco to bid on a large construction contract in Courtland, Alabama, but refused to provide the capital necessary to complete the project. In order to compensate for the bank's alleged breach of the parties' implied agreement, Alafabco completed the Courtland project with funds that would other-

wise have been dedicated to repaying existing obligations to the bank. Alafabco in turn became delinquent in repaying those existing obligations.

On two occasions, the parties attempted to resolve the outstanding debts. On May 3, 1999, Alafabco and the bank executed "'renewal notes'" in which all previous loans were restructured and redocumented. No. 1010703, 2002 WL 1998268, *1 (Ala., Aug. 30, 2002). The debt-restructuring arrangement included an arbitration agreement covering "'all disputes, claims, or controversies.'" That agreement provided that the FAA "'shall apply to [its] construction, interpretation, and enforcement.'" *Id.*, at *1–*2. Alafabco defaulted on its obligations under the renewal notes and sought bankruptcy protection in federal court in September 1999.

In return for the dismissal of Alafabco's bankruptcy petition, the bank agreed to renegotiate the outstanding loans in a second debt-restructuring agreement. On December 10, 1999, the parties executed new loan documents encompassing Alafabco's entire outstanding debt, approximately $430,000, which was secured by a mortgage on commercial real estate owned by the individual respondents, by Alafabco's accounts receivable, inventory, supplies, fixtures, machinery, and equipment, and by a mortgage on the house of one of the individual respondents. *Id.*, at *2. As part of the second debt-restructuring agreement, the parties executed an arbitration agreement functionally identical to that of May 3, 1999.

Within a year of the December 1999 debt restructuring, Alafabco brought suit in the Circuit Court of Lawrence County, Alabama, against the bank and its officers. Alafabco alleged, among other causes of action, breach of contract, fraud, breach of fiduciary duties, intentional infliction of emotional distress, and interference with a contractual or business relationship. Essentially, the suit alleged that Alafabco detrimentally "'incur[red] massive

debt'" because the bank had unlawfully reneged on its agreement to provide capital sufficient to complete the Courtland project. *Id.*, at *1. Invoking the arbitration agreements, the bank moved to compel arbitration of the parties' dispute. The Circuit Court ordered respondents to submit to arbitration in accordance with the arbitration agreements.

The Supreme Court of Alabama reversed over Justice See's dissent. Applying a test it first adopted in *Sisters of the Visitation* v. *Cochran Plastering Co.*, 775 So. 2d 759 (2000), the court held that the debt-restructuring agreements were the relevant transactions and proceeded to determine whether those transactions, by themselves, had a "substantial effect on interstate commerce." 2002 WL 1998268, at *3, *5. Because there was no showing "that any portion of the restructured debt was actually attributable to interstate transactions; that the funds comprising that debt originated out-of-state; or that the restructured debt was inseparable from any out-of-state projects," *id.*, at *8, the court found an insufficient nexus with interstate commerce to establish FAA coverage of the parties' dispute.

Justice See in dissent explained why, in his view, the court had erred by using the test formulated in *Sisters of the Visitation*, in which the Supreme Court of Alabama read this Court's opinion in *United States* v. *Lopez*, 514 U. S. 549 (1995), to require that "a particular contract, in order to be enforceable under the Federal Arbitration Act must, by itself, have a substantial effect on interstate commerce." 2002 WL 1998268, at *11. Rejecting that stringent test and assessing the evidence with a more generous view of the necessary effect on interstate commerce, Justice See would have found that the bank's loans to Alafabco satisfied the FAA's "involving commerce" requirement.

II

The FAA provides that a

> "written provision in any maritime transaction or a contract *evidencing a transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. §2 (emphasis added).

The statute further defines "commerce" to include "commerce among the several States." §1. Echoing Justice See's dissenting opinion, petitioner contends that the decision below gives inadequate breadth to the "involving commerce" language of the statute. We agree.

We have interpreted the term "involving commerce" in the FAA as the functional equivalent of the more familiar term "affecting commerce"—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power. *Allied-Bruce Terminix Cos.*, 513 U. S., at 273–274. Because the statute provides for "the enforcement of arbitration agreements within the full reach of the Commerce Clause," *Perry* v. *Thomas*, 482 U. S. 483, 490 (1987), it is perfectly clear that the FAA encompasses a wider range of transactions than those actually "in commerce"—that is, "within the flow of interstate commerce," *Allied-Bruce Terminix Cos., supra*, at 273 (internal quotation marks, citation, and emphasis omitted).

The Supreme Court of Alabama was therefore misguided in its search for evidence that a "portion of the restructured debt was actually attributable to interstate

transactions" or that the loans "originated out-of-state" or that "the restructured debt was inseparable from any out-of-state projects." 2002 WL 1998268, at *8. Such evidence might be required if the FAA were restricted to transactions actually "'in commerce,'" *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186, 195–196 (1974), but, as we have explained, that is not the limit of the FAA's reach.

Nor is application of the FAA defeated because the individual debt-restructuring transactions, taken alone, did not have a "substantial effect on interstate commerce." 2002 WL 1998268, at *5. Congress' Commerce Clause power "may be exercised in individual cases without showing any specific effect upon interstate commerce" if in the aggregate the economic activity in question would represent "a general practice . . . subject to federal control." *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948). See also *Perez* v. *United States*, 402 U. S. 146, 154 (1971); *Wickard* v. *Filburn*, 317 U. S. 111, 127–128 (1942). Only that general practice need bear on interstate commerce in a substantial way. *Maryland* v. *Wirtz*, 392 U. S. 183, 196–197, n. 27 (1968); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37–38 (1937).

This case is well within our previous pronouncements on the extent of Congress' Commerce Clause power. Although the debt-restructuring agreements were executed in Alabama by Alabama residents, they nonetheless satisfy the FAA's "involving commerce" test for at least three reasons. First, Alafabco engaged in business throughout the southeastern United States using substantial loans from the bank that were renegotiated and redocumented in the debt-restructuring agreements. Indeed, the gravamen of Alafabco's state court suit was that it had incurred "'massive debt'" to the bank in order to keep its business afloat, and the bank submitted affidavits of bank officers establishing that its loans to Alafabco had been used in

part to finance large construction projects in North Carolina, Tennessee, and Alabama.

Second, the restructured debt was secured by all of Alafabco's business assets, including its inventory of goods assembled from out-of-state parts and raw materials. If the Commerce Clause gives Congress the power to regulate local business establishments purchasing substantial quantities of goods that have moved in interstate commerce, *Katzenbach* v. *McClung*, 379 U. S. 294, 304–305 (1964), it necessarily reaches substantial commercial loan transactions secured by such goods.

Third, were there any residual doubt about the magnitude of the impact on interstate commerce caused by the particular economic transactions in which the parties were engaged, that doubt would dissipate upon consideration of the "general practice" those transactions represent. *Mandeville Island Farms*, *supra*, at 236. No elaborate explanation is needed to make evident the broad impact of commercial lending on the national economy or Congress' power to regulate that activity pursuant to the Commerce Clause. *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 38–39 (1980) ("[B]anking and related financial activities are of profound local concern. . . . Nonetheless, it does not follow that these same activities lack important interstate attributes"); *Perez*, *supra*, at 154–155 ("Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce").

The decision below therefore adheres to an improperly cramped view of Congress' Commerce Clause power. That view, first announced by the Supreme Court of Alabama in *Sisters of the Visitation* v. *Cochran Plastering Co.*, 775 So. 2d 759 (2000), appears to rest on a misreading of our decision in *United States* v. *Lopez*, 514 U. S. 549 (1995). *Lopez* did not restrict the reach of the FAA or implicitly overrule *Allied-Bruce Terminix Cos.*—indeed, we did not discuss that case in *Lopez*. Nor did *Lopez* purport to announce a new rule governing Congress' Commerce Clause power over concededly economic activity such as the debt-restructuring agreements before us now. 514 U. S., at 561. To be sure, "the power to regulate commerce, though broad indeed, has limits," *Maryland* v. *Wirtz*, *supra*, at 196, but nothing in our decision in *Lopez* suggests that those limits are breached by applying the FAA to disputes arising out of the commercial loan transactions in this case.

Accordingly, the petition for writ of certiorari is granted, the judgment of the Supreme Court of Alabama is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.